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IN THE

Supreme Court of the United States

NGC SETTLEMENT TRUST AND THE ASBESTOS CLAIMS MANAGEMENT CORPORATION,

Petitioners,

v.

NATIONAL GYPSUM COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the operating entity that emerges from a chapter 11 reorganization is insulated from liability for non-dischargeable asbestos claims merely because the reorganization left intact a non-operating shell corporation with liability for such claims.

II. Whether the operating entity that emerges from chapter 11 can, consistent with the Due Process Clause, escape liability for non-dischargeable asbestos claims.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 14.1(b), all parties to the proceeding are listed in the caption of this petition.

Pursuant to this Court's Rule 29.6, petitioners certify that the parent corporation of petitioner the Asbestos Claims Management Corporation is petitioner NGC Settlement Trust, which has no parent corporation. Petitioners further certify that no publicly held company owns 10% or more of either petitioner's voting stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners NGC Settlement Trust (the "Trust") and the Asbestos Claims Management Corporation ("ACMC") respectfully petition this Court for a writ of certiorari to review a decision of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 3a-39a) is reported at 219 F.3d 478. The memorandum opinion and order of the district court (App., *infra*, 40a-59a) is not reported. The bench ruling (*id.* at 62a-81a) and judgment (*id.* at 60a-61a) of the bankruptcy court are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 18, 2000. A petition for rehearing was denied on December 5, 2000. App., *infra*, 1a-2a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment to the Constitution provides, in pertinent part, that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." Pursuant to this Court's Rule 14.1(f), provisions of the Bankruptcy Code pertinent to this case, including 11 U.S.C. §§ 105, 524(g), 727 and 1141, are reproduced in the Appendix, *infra*, at 81a-96a.

STATEMENT

This case involves the liability of a company, created as part of a bankruptcy reorganization, for claims by persons who were exposed to asbestos products manufactured by the debtor and who were unidentifiable at the time of the bankruptcy case. The bankruptcy court below held that the company is liable for such claims to the extent that funds set aside during the reorganization for this purpose proved insufficient. The district court affirmed. The Court of Appeals, by divided vote, reversed, holding that the new company could only be liable to the extent that such claimants could establish successor liability under state law.

1. On October 28, 1990, chapter 11 petitions were filed by National Gypsum Company ("National Gypsum") and its parent, Aancor Holdings, Inc. (collectively with National Gypsum, the "Debtors"). App., *infra*, 41a. National Gypsum faced claims from two different groups of creditors: bondholders and trade creditors (the "Financial Creditors"), who were owed more than $1 billion, and persons exposed to asbestos products manufactured by National Gypsum (the "Asbestos Claimants"), whose claims were estimated to exceed $800 million. *Id.* at 5a. The Asbestos Claimants consisted of two distinct groups of claimants: those known claimants who held identifiable claims against National Gypsum for exposure to asbestos products manufactured by National Gypsum (the "Current Claimants") and those unknown claimants who in the future would be entitled to assert claims for exposure to asbestos products manufactured by National Gypsum but who, as of confirmation, had no cognizable claim under applicable state law (the "Unknown Claimants"). *Ibid.*

On March 9, 1993, the bankruptcy court entered a confirmation order (the "Confirmation Order") approving a plan of reorganization (the "Plan") for the Debtors. App. *infra*, 42a-43a. Under the Plan, three entities emerged from the bankruptcy proceedings: (1) National Gypsum Company ("New-NGC"), which was wholly owned by the Financial Creditors and received the name, substantially all of the operating assets of the Debtors and the ongoing business of National Gypsum; (2) ACMC (sometimes called "Old-NGC"), which retained National Gypsum's asbestos insurance policies and the stock of The Austin Company, a service subsidiary of the Debtor; and (3) the Trust, which received all of the stock of Old-NGC and was established solely to settle asbestos claims. *Id.* at 42a-43a. This structure effected a distribution to the Financial Creditors, by means of a non-arms-length asset purchase agreement, of substantially all of the operating assets of the Debtors, and enabled the Financial Creditors to continue National Gypsum's operating business. At the same time, the structure afforded the Asbestos Creditors, through the Trust, with control over Old-NGC's asbestos insurance policies that, for insurance reasons, had to remain in the possession of Old-NGC. Thus, for all intents and purposes, New-NGC emerged as the operating entity which continued the operations of National Gypsum under the ownership of the Financial Creditors, and Old-NGC emerged as a liquidating, non-operating shell owned by the Trust.

The original version of the Plan voted on by creditors proposed that all asbestos claims, both current and unknown, would be discharged and that all Asbestos Claimants would be enjoined from proceeding against

New-NGC. App., *infra*, 43a. At the time, it was assumed that (1) the so-called *Georgine* settlement, which limited the number and nature of asbestos claims that were compensable and the amount of compensation payable for each claim, would receive judicial approval and, therefore, (2) the Trust would have sufficient assets to pay all current and unknown asbestos claims through Old NGC's participation in the Center for Claims Resolution ("CCR"), a facility established by a consortium of former asbestos manufacturers. *Id.* at 7a.

The legal representative for the Unknown Claimants (the "Legal Representative"), who had been appointed by the bankruptcy court in late 1992 shortly before the commencement of the plan confirmation hearing, objected to the original version of the Plan on the ground that the bankruptcy court lacked authority to prevent Unknown Claimants from pursuing New-NGC in the future. App., *infra*, 8a. The bankruptcy court sustained this objection, concluding that the future asbestos claims held by Unknown Claimants were not "claims" within the meaning of the Bankruptcy Code, and thus that it lacked jurisdiction to discharge them or to permanently enjoin the Unknown Claimants from pursuing their future claims. *Ibid.* The court concluded that it could, however, issue a temporary injunction requiring the Unknown Claimants to look first to the Trust for payment. *Ibid.* The court's rulings on the issue were incorporated into the Plan as technical modifications, which were adopted by the bankruptcy court. *Id.* at 9a.

Accordingly, as confirmed, the Plan discharged the claims of the Current Claimants, and permanently enjoined these claimants from seeking relief against any entity other than the Trust. *Id.* at 9a. The claims of the

Unknown Claimants were not discharged, but the Confirmation Order included a "Channeling Order" that made the Unknown Claimants beneficiaries of the Trust and enjoined them from suing any other person, including New-NGC, pending exhaustion of the Trust's assets. *Id.* at 9a-10a. On the effective date of the Plan, all of the operating assets of the Debtors were transferred to New-NGC, a newly organized entity created to receive those assets as the distribution to Financial Creditors under the Plan. *Id.* at 10a.

2. In May 1996, the Third Circuit set aside the *Georgine* settlement, and this Court subsequently affirmed that decision. *See Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom. Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591 (1997). These judicial decisions led directly to the filing of the present lawsuit by the Trust. As a result of these decisions, the Trust could no longer pay full tort values to all asbestos disease claimants. App., *infra*, 10a. The Trust and ACMC therefore initiated a declaratory judgment action in the bankruptcy court, seeking a determination that, in the event the Trust exhausted its resources and the Channeling Order lifted, New-NGC—which was denying residual liability to the Unknown Claimants—was liable to such Unknown Claimants to the same extent as National Gypsum had been liable to such Claimants. *Ibid.*

a. In ruling upon the request of the Trust and ACMC, the bankruptcy court held that, under the Plan and its implementing documents, New-NGC remained liable to the Unknown Claimants to the same extent as National Gypsum had been liable to such Claimants. App., *infra*, 62a-81a.

The bankruptcy court recognized that "this declaratory judgment action calls upon the court to determine whether the plan this court confirmed pursuant to a final order of this court imposed or maintained liability for asbestos disease claims on New-NGC." App., *infra*, 64a. In making this determination, the court noted that "[t]he plan and its implementing documents must be read coherently, giving meaning to all its provisions and terms, but doing so consistent with the confirmation order, which governs." *Id.* at 65a. "Applying these fundamental rules of contractual construction," the bankruptcy court conducted a painstaking review of the plan documents and court orders and thereafter found that the Trust and ACMC were entitled to the declaratory relief they sought:

> [T]he plan as confirmed by order of this court implicitly imposes or maintains liability on New-NGC for asbestos disease non-Bankruptcy Code claims not discharged by the confirmation order and not satisfied by the Trust. *That is the only reading that gives meaning to the court's order* that the non-Bankruptcy Code asbestos disease claims could not be and were not discharged; that the [claimants] could not be permanently enjoined from commencing tort litigation against New-NGC and that the channeling order with a temporary injunction [of] suit[] against New-NGC could be lifted by order of this court upon the satisfaction of the enumerated criteria. If the plan did not impose or maintain liability on New-NGC, then the court's decision that the subject claimants could not be permanently enjoined becomes a meaningless

> court order, as does the court's order that those claims could not be discharged.

Ibid. (emphasis added). Accordingly, the bankruptcy court entered a declaratory judgment: "New-NGC is liable for an unknown asbestos disease claim . . . to the extent that such unknown asbestos disease claim has not been discharged by the Plan and Confirmation Order and is not satisfied or otherwise resolved by the Trust and ACMC." *Id.* at 48a. The bankruptcy court made clear, however, that the judgment "does not relieve any individual unknown asbestos disease claimant of any element of his burden of proof in any individual tort litigation." *Id.* at 61a.

b. The district court affirmed the bankruptcy court. App., *infra*, 40a-59a. At the outset, the district court noted that "the issues raised in this Adversary Proceeding required the Bankruptcy Court to interpret the Confirmation Order," and that "when an appellate court reviews a lower court's interpretation of its own order, that interpretation is afforded great deference." *Id.* at 51a. The court held that the bankruptcy court had correctly construed the various documents.

The district court agreed that the plan documents implicitly recognized that New-NGC would remain liable for unknown asbestos claims:

> [T]he Bankruptcy Court explicitly stated in its Confirmation Order that "New-NGC shall not be subject to the commencement or continuation of litigation by any person on or on account of Unknown Asbestos Disease claims *pending exhaustion of the remedy or remedies provided by the NGC Asbestos Settlement Fund.*" The clear

> implication of this statement is that once the Settlement Fund is exhausted, Unknown Claimants may commence litigation against [New-NGC].

App., *infra*, 53a-54a (citation omitted) (emphasis added).

Before the district court, New-NGC argued that while the Plan and the Confirmation Order did not permanently enjoin Unknown Claimants from holding New-NGC liable for their claims, Unknown Claimants nevertheless would have to prove "successor liability" under applicable state law to impose liability on New-NGC. The district court rejected this argument because "nothing in the Plan, Plan Documents or Confirmation Order . . . contemplates this reading." App., *infra*, 54a.

c. The Court of Appeals, by a 2-1 vote, reversed. App., *infra*, 3a-39a.

The majority acknowledged that it "should defer to the bankruptcy court's reasonable resolution of any ambiguities in [the plan] documents." App., *infra*, 15a. The majority also found it appropriate to refer to extrinsic evidence because "where there is ambiguity in the documents, and especially where there is a dispute as to what the parties understood them to mean, extrinsic evidence such as this should inform our analysis." *Id.* at 19a. Despite finding the documents ambiguous, however, the majority did *not* defer to the construction afforded them by the bankruptcy court.

Undertaking its own analysis of the plan documents, the majority concluded that at the time of confirmation of the Plan the bankruptcy court must have intended that New-NGC could be liable to the Unknown Claimants

only upon a finding of successor liability under state law. App., *infra*, 28a. Turning both bankruptcy law in general and the bargain between the creditors of National Gypsum upside down, the majority dismissed Petitioners' arguments that New-NGC is the reorganized debtor and, as such, is liable to Unknown Claimants to the same extent as National Gypsum.

Judge Reavley dissented. He observed that "it is incredible to believe that the bankruptcy court would create this new operating company with debtor assets, after holding that it had no authority to extinguish unknown asbestos claims of the debtor, and then leave it to state law governing successor liability to resolve the future asbestos liability of its mutant creation, without leaving so much as a footnote in the controlling documents suggesting such an intent." App., *infra*, 39a. Judge Reavley opined that the Court of Appeals "should reject the incredible and stay with the judgment of the bankruptcy court." *Ibid.*

REASONS FOR GRANTING THE PETITION

The Court of Appeals has interpreted the Plan in a manner that violates both the Bankruptcy Code and the Due Process Clause of the Fifth Amendment to the Constitution. In so doing, it has created dangerous precedent on issues of fundamental national importance. For these reasons this Court should grant this Petition and take jurisdiction of this case.

In its opinion below, the Fifth Circuit analyzed the issues presented in this case as strictly matters of plan interpretation. "Our duty is to read the Plan documents to determine what is the best interpretation of the court's intent with respect to New-NGC's liability for Unknown

Claims. " App., *infra,* 16a. Adopting this approach, the court ignored its equally important duty to interpret the Plan in a manner consistent with the Bankruptcy Code and the Constitution. Nowhere in its opinion does the court analyze whether any of the competing interpretations of the Plan, much less the interpretation adopted by the court, were consistent with applicable law. As a result, the court approved an interpretation of the Plan that violates both the Bankruptcy Code and the Due Process Clause. Specifically, and as discussed more fully below, the court's holding violates the discharge provisions of the Bankruptcy Code, as set forth in Section 1141, and severely prejudices the rights of Unknown Claimants in violation of the Due Process Clause.

The impact of the court's errors is significant and widespread. More than 400,000 Unknown Claimants in this case alone will be effectively precluded from recovering for their injuries. The impact, however, is not limited to this case. The court's opinion creates a dangerously bad precedent that affects future asbestos claimants and other mass tort victims in other cases. Because of the broad effect of the Fifth Circuit's erroneous opinion, the Court should grant this Petition and assert jurisdiction over this case.

I. The Fifth Circuit's Opinion Violates Section 1141 Of The Bankruptcy Code And Effectively Insulates New-NGC From Future Asbestos Claims That Have Not Been Discharged.

The Fifth Circuit approached the issues presented in this case strictly as a matter of plan interpretation. Identifying three alternative interpretations of the Plan, the court based its ruling on its determination that New-NGC was not the reorganized debtor, but instead a "new

corporation" that purchased the operating assets of the Debtors free and clear of claims of creditors of the Debtors, including specifically Unknown Claims. On that basis, the court held that New-NGC could only be liable to Unknown Claimants to the extent that such claimants could establish successor liability under applicable state law.

As the bankruptcy court and the district court both recognized, however, New-NGC, far from being an unrelated third party asset purchaser, was an entity created in connection with the Plan to hold National Gypsum's operating assets and continue National Gypsum's operating business, including the Gold Bond division which had produced the asbestos products manufactured by National Gypsum. The owners of New-NGC were the Financial Creditors who received their ownership interest not through a purchase but through a distribution under the Plan on account of their claims against National Gypsum. In the Confirmation Order, the bankruptcy court not only refused to discharge and enjoin future claims, but it refused to transfer the operating assets to New-NGC free and clear of these future claims. Under these circumstances, New-NGC can not have been afforded any greater protection from future claims than Old-NGC. Yet, the Fifth Circuit would cloak New-NGC with additional protection and, in the process, undermine the bargain evidenced by the Plan and the carefully constructed discharge limitations imposed by the bankruptcy court in the Confirmation Order.

A. The Fifth Circuit's Opinion Ignores The Confirmation Order In Violation Of Section 1141 Of The Bankruptcy Code.

Chapter 11 of the Bankruptcy Code provides for the reorganization of corporate debtors. *See generally* 7 *Collier on Bankruptcy* ¶ 1100.01. The goal of a chapter 11 case is confirmation of a reorganization plan that, to the extent provided in Section 1141 of the Bankruptcy Code, results in a discharge of dischargeable claims. Section 1141 of the Bankruptcy Code is the specific provision that governs the discharge of chapter 11 debtors. While the provisions of Section 1141 are broad and powerful, they are not unlimited. Consistent with the principle that the powers and jurisdiction of bankruptcy courts are limited to that expressly granted by Congress, Section 1141 does not discharge *all* claims against *all* chapter 11 debtors. Importantly, Section 1141 expressly provides that the discharge granted by that section is subject to the terms of the plan and the order confirming the plan. *See* 11 U.S.C. § 1141(c) and (d).

At confirmation in early 1993, the bankruptcy court reached two related conclusions that affect the scope of the discharge granted to Old-NGC and New-NGC in the Confirmation Order. First, the bankruptcy court concluded that Unknown Claims were not claims cognizable under the Bankruptcy Code and, as a result, the bankruptcy court held that constitutionally and jurisdictionally it could not discharge these claims or permanently enjoin the claimants who would later hold them. App., *infra,* 67a-68a. Second, the bankruptcy court held that it could transfer the operating assets to New-NGC free and clear of Bankruptcy Code claims only. Since the bankruptcy court had concluded that Unknown

Claims were not claims cognizable under the Bankruptcy Code, the bankruptcy court concluded that it could not and, therefore, did not transfer the operating assets free and clear of Unknown Claims. In the Confirmation Order, which takes precedence over the Plan and the asset purchase agreement, the bankruptcy court transfers the operating assets to New-NGC "free and clear of all liens, claims . . . to the maximum extend (sic) permitted by the Bankruptcy Code. " *Id.* at 22a. The qualifier at the end of this conveyance language specifically addressed the bankruptcy court's conclusion that it could not transfer the operating assets free and clear of Unknown Claims. Section 1141(c) of the Bankruptcy Code provides that the property dealt with by the Plan is free and clear of all claims except as otherwise provided in the Plan or in the order confirming the Plan. In this case, the Confirmation Order expressly held that future claims were not Bankruptcy Code claims and that the transfer of the assets to New-NGC was free and clear only of non-Bankruptcy Code claims.

As the bankruptcy court, the district court and Judge Reavley in dissent all recognized, the result of these two critical conclusions—that only Bankruptcy Code claims were discharged and that the assets were transferred to New-NGC free and clear only of Bankruptcy Code claims—is that New-NGC, as the reorganized operating entity and not some third party stranger to the chapter 11 case, received the operating assets subject to the Unknown Claims and retained liability to the Unknown Claimants to the same extent as National Gypsum.

In reaching the opposite conclusion, the panel, however, turned the Bankruptcy Court's jurisdictional and constitutional rulings on their head. According to the

majority, once the bankruptcy court had determined that it lacked jurisdiction over the Unknown Claims, it was powerless to "impose" liability for those claims on New-NGC. App., *infra*, 26a, 28a. The jurisdictional ruling in the Confirmation Order, however, leads to the exact opposite conclusion. The bankruptcy court's lack of jurisdiction over the Unknown Claims is not a limitation on its ability to "impose" those liabilities on New-NGC, but on its ability to *remove* them. The natural consequence of the bankruptcy court's 1993 jurisdictional ruling is not that these Unknown Claims are somehow magically imposed on New-NGC's hull, but rather that New-NGC is liable for the Unknown Claims because the bankruptcy court lacked authority to discharge them or to transfer National Gypsum's operating assets free and clear of them.

Notwithstanding the panel's concession that future asbestos claims were not discharged in the chapter 11 case—a conclusion that neither New-NGC nor anyone else has ever challenged and that unquestionably is the law of this case -- the panel concluded that those claims had, in fact, been effectively discharged *sub silentio* as a result of the structure of the confirmed Plan. This ruling elevates form over substance and, in doing so, clearly violates Sections 1141(c) and (d), which mandate that the terms of the Confirmation Order control the scope of any discharge and the extent to which property of the debtor's estate is transferred free and clear of claims.

B. By Elevating Form Over Substance, The Fifth Circuit Has Impermissibly Extended The Protections Afforded By Section 1141.

The Fifth Circuit's holding that New-NGC is a "new corporation" which has purchased the operating assets of

the Debtors without direct liability for the Unknown Claims ignores the economic realities of this bankruptcy case, and the impact of the Confirmation Order. This interpretation impermissibly extends the reach of Section 1141 and provides New-NGC with protections far greater than those permitted under the Bankruptcy Code. More importantly from a policy perspective, the rationale of the Fifth Circuit will encourage chapter 11 debtors generally to seek to avoid tort liability for past conduct through the simple expedient of establishing, through a plan, a new corporation that gains the benefit of the debtor's operating assets without the burden of its non-dischargeable tort liabilities. Neither the Bankruptcy Code nor the Plan or Confirmation Order allow such an inequitable result.

New-NGC is not a third party to this case. To the contrary, it is, for all practical purposes, the reorganized operating debtor under the Plan. It was created solely to hold the operating assets and continue the operating business of National Gypsum for the benefit of the Financial Creditors. Moreover, the Plan transaction involving New-NGC was not an arms-length third party purchase. In a typical third party purchase, assets of the debtor would have been exchanged for cash that would then have been available to satisfy the claims of all unsecured creditors on an equal footing. Here, assets of National Gypsum were merely segregated, albeit in a newly formed company, for the benefit of some but not all unsecured creditors.

To treat this transaction as a third-party purchase merely because it was effectuated by an asset purchase agreement elevates form over substance in disregard of Section 1141 and the rights of Unknown Claimants. In

reality, the asset purchase agreement, which was not the product of an arms-length negotiation and, in fact, was executed on behalf of both buyer and seller by the same person, was merely the means to effect the distribution to the Financial Creditors. This type of transfer to a debtor's creditors to implement a plan is specifically authorized under Section 1123(a)(5)(B) of the Bankruptcy Code. 11 U.S.C. § 1123(a)(5)(B). But, the nature of the transfer does not change the underlying character of the transaction nor does it entitle New-NGC to any greater discharge protection than is afforded any other reorganized debtor. Whether New-NGC is technically the reorganized debtor or not, it is certainly no third party purchaser and should not be held to have received protections upon emerging from the bankruptcy case that a bankruptcy court has no authority to grant to a debtor. The Fifth Circuit's holding, by distorting the economic realities of the Debtors' reorganization and elevating form over substance, effectively provides New-NGC a discharge that is far more expansive than the discharge that the bankruptcy court determined it had authority to grant and, pursuant to the provisions of Section 1141 of the Bankruptcy Code, did grant.

It is no answer to say, as the court below did, that New-NGC may be liable upon a showing of successor liability under state law. The doctrine of successor liability immunizes good faith purchasers of a bankrupt's assets, except in cases where the purchaser agreed to assume the seller's liabilities, or where the transaction was clearly designed to fraudulently evade creditors. *See* 8 *Collier in Bankruptcy* ¶ 1141.04(2). By relegating Unknown Claimants to state law successor liability principles, the Fifth Circuit effectively discharges these claims

because state successor liability law, in virtually all cases, imposes an insurmountable burden to recovery by these claimants—a burden which clearly did not exist before the chapter 11 case. In Texas, for example, implied successor liability has been eliminated by statute, and an acquiring corporation is not responsible for any liability of the seller that was not expressly assumed. Tex. Bus. Corp. Act Ann. § 5.10(B)(2); *see also Nissen Corp.* v. *Miller*, 594 A.2d 564, 620 (Md. 1991) (holding that the continuity of enterprise theory of successor liability "is the continuation of the *corporate entity* rather than continuation of the business operation," and refusing to adopt an exception that would attach liability for continuation of the business operation). In fact, New-NGC, not surprisingly, asserts that it is not liable to future asbestos claimants under the successor liability law of any jurisdiction.

C. The Fifth Circuit's Error Is Of Substantial Nationwide Importance

At a minimum, the panel's decision undermines the Plan and jeopardizes the availability of tort remedies for over 400,000 Unknown Claimants. Moreover, the decision has equally serious repercussions for future claimants in any asbestos-related bankruptcy and, indeed, in any bankruptcy involving a company with mass tort exposure.

Not only is the opinion below irreconcilable with Section 1141, it also creates a roadmap for circumventing the express protections for future claimants that Congress put in place by enacting Section 524(g) of the Bankruptcy Code in 1994. Section 524(g) provides that the claims of future asbestos claimants may only be dealt with in a bankruptcy case if the plan of reorganiza-

tion meets certain very specific requirements set forth in the statute. Specifically, Section 524(g) provides that bankruptcy courts may enjoin future asbestos claimants from pursuing a debtor only if those claimants have recourse to a plan-created trust that owns, or has the potential to own, a majority of the voting stock of the reorganized debtor. This provision ensures that future claimants will not be deprived of an effective remedy against the debtor.

The injunction authorized in Section 524(g) gives an operating company substantial protection from future asbestos claims, but only if the operating company is reorganized and the asbestos creditors have the ability, through their majority ownership of the reorganized operating entity, to participate in the success of the operations. The construction afforded the Plan by the court below, however, destroys any incentive for asbestos companies to use the Section 524(g) mechanism. By transferring its operating assets to a newly created entity owned by its financial creditors and leaving the asbestos creditors with a corporate shell containing a diminishing quantum of non-operating assets, asbestos companies will now be able to use the decision in this case to avoid giving up a majority equity stake in the true operating entity and to argue that the *shell* is the "reorganized" debtor, and that the shell alone retains direct liability for future asbestos claims.

By establishing a precedent that provides bankruptcy courts, and overreaching chapter 11 debtors, a vehicle to circumvent the requirements of Sections 1141 and 524(g), the court of appeals' interpretation of the Plan will substantially prejudice bankruptcy protections for mass tort victims and give bankruptcy courts a green

light to substitute their own *ad hoc* equitable judgment for the legislative judgment of Congress.

In Section 524(g), Congress evinced a clear preference for bright-line ground rules that force mass tort defendants to reorganize in a way that protects future claimants. The court below, however, effectively bestowed on bankruptcy courts the power to approve plan structures that effectively undermine the rights of future claimants and subvert the protections of Section 524(g).

If the decision below stands, *all* mass tort defendants could exploit the equitable jurisdiction of bankruptcy courts to do what New-NGC is attempting to do here: fashion a plan that allows them, *ex post*, to claim that a specially designed *liquidating* corporate shell is the statutory reorganized debtor, leaving a newly-created operating company free and clear of all tort liability. Future bankrupt corporations, particularly those facing substantial tort liability, will be able to adopt this strategy as a matter of course, enabling the reorganized entity to claim that successor-liability law shields it from all of its non-discharged obligations. The new, vibrant entity would be safe from future claims based on the debtor's pre-bankruptcy conduct, *regardless* of whether the liquidating debtor—an empty shell—received (or legally could receive) a discharge of those claims.[1] Secure in the ability to evade future claims through this ruse, companies would be less willing to remediate tortious activities.

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[1] Liquidating debtors are not entitled to a discharge under Bankruptcy Code Sections 1141(d) and 727.

In short, if a chapter 11 debtor can do what the Fifth Circuit approved here, a major victory will have been won for the manufacturers of dangerous products, at the expense of future mass tort victims. As just one example, tobacco manufacturers could, through a chapter 11 plan, transfer their assets to a freshly minted corporate shell, which would be owned by its current creditors. Future victims of smoking-related diseases would have no recourse against such an entity unless they could prove that it constitutes a successor corporation under the various state laws, a daunting task if the transaction is properly structured by the company's attorneys, and one that, at best, will yield highly disparate results for claimants located in different States. Such a distortion of the bankruptcy process cannot be reconciled with either the Bankruptcy Code or fundamental fairness.

II. The Court Of Appeals' Interpretation Of The Plan Violates The Due Process Rights Of Absent Persons

The interpretation of the Plan approved by the Court of Appeals not only violates Section 1141, it also wreaks havoc with the due process rights of Unknown Claimants. Applying constitutional and jurisdictional principles, the Bankruptcy Court, at the confirmation hearing on the Plan, held that the claims of Unknown Claimants were not discharged. This ruling has not been challenged in any court and is now the undisputed law of this case. Significantly, this ruling also provided the basis for the ruling by the bankruptcy court that no due process rights of Unknown Claimants were impacted by the confirmation of the Plan.

As discussed above, the Fifth Circuit's interpretation of the Plan, however, results in the effective discharge of

the claims of Unknown Claimants. This result violates the due process rights of Unknown Claimants in a way not previously countenanced by this Court and effectively renders meaningless the bankruptcy court's confirmation ruling that Unknown Claimants could not be impacted or enjoined by confirmation of the Plan.

In *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1998), this Court held that future asbestos claimants' rights cannot be extinguished by a settlement class action without "notice and opportunity to be heard" and "at a minimum" an opportunity for future asbestos claimants to opt out of the settlement class. 527 U.S. at 848. Any doubt about the need to protect future claimants was dispelled by the fact that Fibreboard used the trust to deny future asbestos claimants access to "virtually its entire net worth," which Fibreboard retained for itself (with the exception of its insurance policies, which were used to fund the settlement trust). *See id.* at 859-60. Given this fact, said the Court, "it hardly appears that such a regime is the best that can be provided" for future asbestos claimants. *Id.* at 860.

A. The Decision Below Effectively Extinguishes The Claims Of Future Asbestos Victims Against New-NGC

The due process requirements on which this Court relied in *Ortiz* do not die in bankruptcy. Although Congress, through adoption of section 524(g), has now spoken as to how due process can be satisfied relative to future asbestos claims in bankruptcy cases, when the bankruptcy court confirmed the Plan Congress had not yet spoken. The bankruptcy court concluded that due process concerns prevented the discharge or injunction of such future claims. Similarly, the bankruptcy court con-

cluded that it could only transfer the operating assets to New-NGC free and clear of current asbestos claims. Based on these rulings, which are now law of the case, none of the safeguards that other courts had required in the context of a pre-Section 524(g) discharge of future asbestos claims were necessary in this case. Because the absence of a discharge and injunction meant that the operating entity, New-NGC, had continued liability for Unknown Claims and because the operating assets were transferred to New-NGC subject to these claims, it was not necessary to give the asbestos claimants at least 50% of the ongoing ownership of the operating entity as these claimants had received in every other pre-Section 524(g) case where the asbestos claims were discharged and enjoined.[2]

Ironically, the Fifth Circuit, under the guise of protecting a "bargain" that was never struck, has provided New-NGC, which did not receive a discharge from future claims, with protection from lawsuits by future asbestos claimants that no other asbestos producers, even those that did receive discharges from future claims, have ever received. In the process, the Fifth Circuit has trampled the due process rights of the future claimants so assiduously protected by the bankruptcy court both in its decision on confirmation and in the decision on appeal here and by Congress in the enactment of Section 524(g).

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[2] Notably, because of the requirements of section 524(g), every case since the adoption of this section has also provided for the asbestos claimants to own at least 50% of the operating entity.

The claims possessed by future asbestos claimants here are just as amorphous and uncertain as those in *Ortiz*. And, as in *Ortiz*, those claims competed with the current claims of present asbestos claimants and others with current *liquidated* interests. The temptation to shortchange future claimants who were not present to assert their rights ran high—and, as this appeal demonstrates, has materialized. Like the settlement in *Ortiz*, the Plan kept the operating assets of the debtor (minus insurance policies) separate from the fund dedicated to satisfying asbestos claims. Unlike the settlement in *Ortiz*, however, the Plan as interpreted by the bankruptcy court and the district court preserved the rights of future claimants. To preserve these rights, the bankruptcy court accepted the Legal Representative's confirmation argument that the Plan could not bind future claimants and refused to discharge or permanently enjoin their claims. Now, over seven years after the Confirmation Order has become final and nonappealable, the Fifth Circuit, in violation of the due process rights of future claimants and without any of the procedural safeguards required by *Ortiz*, has rewritten the law of this case. According to the Fifth Circuit, the assets of New-NGC, the operating entity that emerged from the Plan, are effectively shielded from future asbestos plaintiffs. Under the Plan as construed by the Court of Appeals, these claimants have no effective recourse when, as is expected to occur, the Trust is able to pay at most only a fraction of the value of their claims. To recover against New-NGC, these claimants will have to convince a court that New-NGC can be held liable under varying successor liability principles, an additional, material hurdle that these claimants would not have been required to jump if National Gypsum's reorganization had merely followed

the more traditional route of continuing the operating business in Old-NGC.

B. The Court of Appeals' Error Is Of Substantial Nationwide Importance

The asbestos crisis has posed difficult questions, of the highest order, about the role of the judiciary and the rights of litigants. Prior to *Amchem v. Windsor Corp.*, *supra,* and *Ortiz*, lower federal courts attempted to fashion solutions to these questions through the creative use of the class action device. That experiment, however, proved inimical to the statutory and constitutional rights of asbestos litigants. Its demise has "created a vacuum which other practitioners of dispute resolution, like bankruptcy specialists" will be eager to fill. Edith H. Jones, *Rough Justice in Mass Future Claims: Should Bankruptcy Courts Direct Tort Reform?,* 76 Tex. L. Rev. 1695, 1702 (1998).

But if the arena in which the questions posed by mass tort litigation has changed, the issues at stake have not. Indeed, in some ways, bankruptcy presents even more of a threat to the rights of asbestos claimants, and even more potential for judicial overreaching.

Bankruptcy proceedings, which are designed to deal with the economic realities of ordinary commercial insolvency, not the due process challenges of modern mass tort litigation, do not carry with them the carefully crafted safeguards that Rule 23 provides. This is precisely why Congress enacted Section 524(g) to deal with future asbestos claims, and precisely why this Court should consider unacceptable the Fifth Circuit's decision below. If the holding of the Court of Appeals is allowed to stand, the due process protections Congress intended

to put in place with the enactment of Section 524(g) will be emasculated and mass tort victims will be left with little more than the equitable dispensation of the bankruptcy court for protection.[3]

Mass tort litigation will gravitate toward bankruptcy as an inevitable result of this Court's shutting the door on abusive class action "settlements." Indeed, at least five former asbestos manufacturers have filed for bankruptcy since the beginning of 2000. *See* Kim, "G-I Holdings' Bankruptcy Filing Cites Exposure in Asbestos Cases," Wall St. J., Jan. 8, 2000, at B12. Accordingly, the need for vigilance increases. The bankruptcy court and the district court displayed vigilance by logically and consistently applying the law of the case and looking past structure to the substance of the bankruptcy transaction at issue. They concluded that the confirmation decision not to discharge and enjoin future claims would be rendered meaningless and superfluous if these claims could magically be scraped from New-NGC's hull by virtue of the form of the reorganization. The Fifth Circuit, on the other hand, failed to be vigilant in this case, and treated this dispute as a routine exercise in contractual interpretation. It is nothing of the sort. The asset purchase agreement at issue is not a true third party asset sale agreement; rather, it is merely the procedural mechanism by which the Financial Creditors received their distribution under the Plan. The crux of this dispute is not about contract interpretation, but rather about

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[3] Section 105 of the Bankruptcy Code generally grants the bankruptcy courts equitable power to issue any order "that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a).

form over substance and the due process rights of future claimants. Yet, form should not be elevated over substance to create dangerous precedent, undermine the law of the case and allow New-NGC and any other clever mass tort defendant "to shoehorn mass tort litigation into a coercive, collective [after-the-fact] settlement" that serves the interests of favored creditors at the expense of asbestos victims. *See* Jones, 76 Tex. L. Rev. at 1722.

If upheld, the only immediate beneficiaries of the decision below—other than New-NGC and its stakeholders (*i.e.*, the non-asbestos creditors)—will be bankruptcy courts and overreaching chapter 11 debtors, which will have been given a green light to use the "raw [discretionary] power conferred by the automatic stay, the truncation of traditional litigation procedure, the cramdown of dissenting classes and creditors, the pressure of multiparty bargaining, and channeling injunctions" to deal with one of the most pressing problems of contemporary tort law. *Id.* at 1722. Whether this is the *proper* role for bankruptcy courts, however, is a decision for Congress and not courts to decide. *See Ortiz*, 527 U.S. at 865 (Rehnquist, C.J., concurring) (the "'elephantine mass of asbestos cases' . . . cries out for a *legislative* solution") (emphasis added).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-10758

In The Matter Of: NATIONAL GYPSUM COMPANY;
AANCOR HOLDINGS INC.

Debtors.

THE NEW NATIONAL GYPSUM COMPANY

Appellant,

v.

THE NATIONAL GYPSUM COMPANY
SETTLEMENT TRUST,

Appellee.

No. 99-10760

In The Matter Of:
NATIONAL GYPSUM COMPANY

Debtor.

NATIONAL GYPSUM COMPANY,

Appellant,

v.

NGC SETTLEMENT TRUST; THE ASBESTOS
CLAIMS MANAGEMENT CORPORATION,

Appellees.

Appeals from the United States District Court for the Northern District of Texas, Dallas

ON PETITION FOR REHEARING EN BANC

[Filed December 5, 2000]

(Opinion 7/18/00, 5th Cir., 2000, 219 F.3d 478)

Before REAVLEY, SMITH, and EMILIO M. GARZA, Circuit Judges.

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Jerry Smith
United States Circuit Judge

Judges Higginbotham and Barksdale did not participate in the consideration of the petition for rehearing en banc.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-10758

In The Matter Of:
NATIONAL GYPSUM COMPANY AND
AANCOR HOLDINGS INC.,

Debtors.

THE NEW NATIONAL GYPSUM COMPANY,

Appellant,

VERSUS

THE NATIONAL GYPSUM COMPANY SETTLEMENT TRUST,

Appellee.

No. 99-10760

In The Matter Of:
NATIONAL GYPSUM COMPANY,

Debtor.

NATIONAL GYPSUM COMPANY,

Appellant,

VERSUS

NGC SETTLEMENT TRUST AND
THE ASBESTOS CLAIMS MANAGEMENT
CORPORATION,

Appellees.

Appeals from the United States District Court
for the Northern District of Texas

July 18, 2000

Before REAVLEY, SMITH, and EMILIO M. GARZA, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

In 1993, the bankruptcy court entered an order (the "Confirmation Order") confirming the joint chapter 11 plan of reorganization (the "Plan") of Aancor Holdings, Inc. ("Aancor"), and its wholly-owned subsidiary, National Gypsum Company ("Old-NGC"), and approving certain plan documents. As a result of the bankruptcy reorganization, National Gypsum Company ("New-NGC") was created as a new Delaware corporation. Four years later, the NGC Settlement Trust (the "Trust") and its subsidiary, formerly Old-NGC and now called Asbestos Claims Management Corporation ("ACMC"), filed this declaratory judgment action in bankruptcy court, seeking a determination that, under the Plan, New-NGC was liable for any unknown asbestos disease claims (the "Unknown Claims") arising from Old-NGC's torts and not resolved by the Trust.

Following an adversary hearing, the bankruptcy court delivered a bench ruling in which it concluded that under the Plan, New-NGC was liable for Unknown Claims the Trust could not satisfy. New-NGC appealed to the district court, which affirmed. Concluding that the Confirmation Order and other plan documents do not

transfer liability for these Unknown Claims from Old-NGC to New-NGC, we reverse and remand.

I.

In October 1990, Old-NGC and Aancor filed petitions, later consolidated, for relief under chapter 11 of the Bankruptcy Code. Old-NGC faced two key groups of creditors: Unsecured bond and trade creditors that were owed approximately $1.1 billion, and asbestos-related claimants who had an estimated $127 million due for pending claims and projected future disease claims of $695 million to $764 million.

The bankruptcy court appointed committees to represent the holders of the unsecured bond and trade claims (the "BT Committee") and the asbestos claims (the "Asbestos Committee") and a legal representative to represent holders of Unknown Claims. After selling some of its assets, Old-NGC retained two of its subsidiary businesses: the Gold Bond Building Products division ("Gold Bond"), which produces and sells gypsum and wallboard-related products, and the Austin Company ("Austin"), a design, engineering, and construction firm. Old-NGC also retained insurance coverage ("Insurance") available to pay some asbestos claims.

Old-NGC, the Asbestos Committee, and the BT Committee agreed on how Old-NGC's assets would be used to pay commercial and asbestos claims. Commercial creditors would receive Gold Bond, and asbestos claimants would receive Old-NGC and its assets, including Austin, the Insurance, certain insurance-related claims, and $ 10 million from New-NGC. Under a draft plan of reorganization (the "Draft Plan"), Aancor, the parent debtor, would be merged into Old-NGC, with

Old-NGC as the surviving entity. Old-NGC was to be renamed Asbestos Claims Management Corporation, and two new entities were to be created, the Trust and New-NGC. The Draft Plan was approved by the necessary classes of commercial creditors and both classes of asbestos creditors.

Under the Draft Plan, New-NGC, a new Delaware corporation, would purchase from Old-NGC the operating assets and business of Gold Bond, including the name "National Gypsum Company." The commercial creditors then would look to New-NGC, while the asbestos claimants would look to the Trust.

Because under the Draft Plan the commercial creditors would own New-NGC, worth approximately $350 million, and because they had, in return, agreed to extinguish over $1 billion in claims against Old-NGC, the commercial creditors also requested a permanent injunction, in the Confirmation Order, protecting New-NGC from future and Unknown Claims, to maximize the value of New-NGC's securities in the public markets by removing any taint from the possibility of asbestos-related liability. Thus, the Draft Plan provided not only that the Trust would be established and would assume sole responsibility for all asbestos claims, including Unknown Claims, but also that the Confirmation Order would contain a "channeling order and permanent injunction" that would channel all asbestos claims to the Trust and forever would bar the assertion of any asbestos claims against New-NGC.

The Draft Plan also provided for the formation of the Trust, which would retain Austin (valued at approximately $125 million), the Insurance (worth between $300 million and $600 million, depending on how pend-

ing coverage litigation was resolved), certain other insurance-related claims, and a $10 million cash payment from New-NGC. As a result, the Draft Plan made it likely, but not a certainty, that the Trust assets would be sufficient to pay all present and future asbestos diseases claims, particularly if the settlement in the related litigation in *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3d Cir. 1996), were approved.

This payment-in-full was to be accomplished through a joint defense facility, the Center for Claims Resolution ("CCR"), established in 1988 by Old-NGC and nineteen other former asbestos companies. CCR set up an administrative compensation system that, in most cases, would replace judicial resolution of asbestos claims; this facility was subject to approval in the *Georgine* settlement.[1] Regardless of the level of funding that ultimately would be available for these claims, however, the Trust was required to give all claims, whether current or unknown, "substantially equivalent" treatment.

If the then-pending *Georgine* settlement were not approved, the Draft Plan included a back-up option that required the Trust to implement the "Alternate Asbestos Disease Claims Resolution Facility" (the "Alternate Facility"), which would provide for the ratable distribution of Trust assets to all projected asbestos claimants. A claimant would receive a percentage of the liquidated value of his claim, calculated by dividing the value of Trust assets by the projected amount of all future liabili-

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[1] *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 599-605 (1997) (describing the CCR's system for settling and compensating asbestos-related claims).

ties. The Alternate Facility was designed, therefore, to preserve "sufficient resources to pay future valid [asbestos claims] on a substantially equivalent basis."

The Draft Plan was submitted to the bankruptcy court for approval. The legal representative of the Unknown Claimants opposed the provision for a permanent injunction, fearing that New-NGC would not assume even non-asbestos-related claims arising post-petition and that, as a result, those obligations might have to be born by Old-NGC or the Trust.

Following hearings on asbestos issues in January 1993, the bankruptcy court decided that it lacked jurisdiction to enjoin permanently or to discharge Unknown Claims. It reasoned that persons who had not yet suffered an injury that was cognizable under applicable non-bankruptcy law did not hold "claims" within the meaning of section 101(5) of the Bankruptcy Code. The court also concluded, however, that it did have the power to enter a temporary injunction that would require Unknown Claims first to be exhausted from the Trust before the claimants asserting them could pursue remedies against any other person, including New-NGC.

Because they were uncertain how to re-draft the injunctive language, the parties in February 1993 addressed to the bankruptcy court the issue of the temporary injunction and New-NGC's potential liability for any Unknown Claims. The court, however, was unwilling to take a position on whether New-NGC would be liable in the future for the Unknown Claims, noting that this liability should be decided according to non-bankruptcy law and that New-NGC could defend any future suits by claiming that it was not a successor to the debtors' liabilities.

As a consequence of the January 1993 decision and the February 1993 hearing, the Draft Plan was modified to eliminate the permanent injunction against Unknown Claims, though that injunction would be in effect against current asbestos claims. In March 1993, Old-NGC proposed the Third Technical Modifications to the Plan, which changed the Draft Plan (1) by drawing a distinction between current claims and Unknown Claims to exclude Unknown Claims from the discharge and (2) by removing the permanent injunction against Unknown Claims and replacing it with the more limited "Channeling Order and Injunction."

The BT Committee objected, arguing that this was a substantial change from the Draft Plan that would permit the Unknown Claims to be litigated against New-NGC after remedies against the Trust had been exhausted. The bankruptcy court rejected this objection, however, and approved the Third Technical Modifications, reasoning that the changes to the Draft Plan did "not adversely change the treatment under the Plan of any [creditor]."

As approved, then, the Plan provided, in pertinent part, that current asbestos claimants were permanently enjoined from ever suing any person other than the Trust, including New-NGC. Unknown Claimants were neither discharged nor permanently enjoined but were "made beneficiaries of the [Trust] and, pending exhaustion of the remedies of the [Trust] to resolve Unknown Claims, are enjoined" from pursuing litigation against any person, including New-NGC. This temporary injunction is referred to throughout the Plan, Confirmation Order, and briefs as the "Channeling Order."

The modifications to the Plan did not alter the previous Draft Plan's section that provided that New-NGC would not assume asbestos liabilities of Old-NGC: "Upon consummation of the Merger and this Plan, New-NGC shall perform all of the obligations of the Debtors under this Plan (except for the obligations regarding the Asbestos Claims which shall be the sole responsibility of the [Trust])." "Asbestos Claims" were defined to include both current and Unknown Claims. Likewise, the Confirmation Order included a detailed description of the Channeling Order and reiterated that "New-NGC shall not be subject to the commencement or continuation of litigation by any person on or on account of Unknown Asbestos Disease Claims pending exhaustion of the remedy or remedies provided by the [Trust]."

Finally, the assets of Old-NGC were transferred to New-NGC pursuant to an asset purchase agreement (the "APA"). The APA was expressly approved by the bankruptcy court's Confirmation Order and provided that New-NGC would not assume any asbestos-related liabilities, including Unknown Claims. In July 1993, the Plan was substantially consummated, and New-NGC issued to commercial creditors its securities, which subsequently were traded in the public markets.

In May 1996, the Third Circuit set aside the *Georgine* settlement, and the Supreme Court affirmed that decision in *Amchem,* 521 U.S. at 629. This led directly to the filing of the present lawsuit—the Trust alleged that because it could no longer participate in the CCR facility, its assets would be insufficient to pay full tort values to all asbestos disease claimants. The Trust, as a result, looked for alternate funding for asbestos claimants and sought a determination that "the Plan Docu-

ments indicate New NGC has liability for the asbestos liabilities of Old NGC." Specifically, the Trust contended that the bankruptcy court's 1993 denial of the permanent injunction, the entry of the Channeling Order, and the findings made in support of those decisions indicated that New-NGC was liable for the Unknown Claims.

The bankruptcy court agreed with the Trust, stating that "the plan as confirmed by order of this court implicitly imposes or maintains liability on New-NGC for asbestos disease non-Bankruptcy Code claims not discharged by the confirmation order and not satisfied by the Trust." The court explained why this result was only "implicit":

> By implicitly addressing this asbestos liability, rather [than] explicitly doing so, and by deferring the matter as provided in the plan, the court enabled New NGC to emerge in the marketplace post-confirmation as an effective entity, poised, under the right market conditions to prosper, and thereby benefit all the constituencies.

In affirming the bankruptcy court, the district court acknowledged that "when viewed in isolation, certain provisions of the Confirmation Order, the Plan and the [APA] arguably support the Appellant's arguments that New NGC emerged from the bankruptcy proceedings without any liability for unknown asbestos claims." Nevertheless, the district court concluded that those provisions should be read in the context of the entire Plan, and it agreed that implicit in the Confirmation Order was the idea "that if the Trust had insufficient assets to satisfy the unknown claims, those claimants could look to New NGC."

II.

New-NGC asserts that the Trust is not the real party in interest and, in a related argument, that the Trust does not have standing to seek the determination that New-NGC is liable for Unknown Claims. First, New-NGC argues that the real parties in interest are any potential Unknown Claimants who first exhaust Trust remedies without having their claims resolved, then obtain a judicial termination of the Channeling Order as to their claims, and finally bring their claims against New-NGC in non-bankruptcy courts based on applicable state law. New-NGC points out that no such claimants yet exist.

New-NGC asserts that the Trust has no substantive rights of its own against New-NGC, because the Plan and Confirmation Order contemplate that the Trust retain liability for *all* asbestos claims until its assets are exhausted. Thus, New-NGC reasons that because the Trust has no rights under substantive law against New-NGC, New-NGC cannot be the real party in interest.[2]

The Trust properly points out, however, that the real party in interest is "not necessarily the person who will ultimately benefit from the recovery." *See Farrell*, 896 F.2d at 140. Because the Plan charges the Trust with the ongoing duty of distributing the assets of the estate to the asbestos creditors, the substantive right the Trust seeks to be enforced is the right to have the bankruptcy court interpret and construe the Confirmation Order,

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[2] *See Farrell Constr. Co. v. Jefferson Parish, La.*, 896 F.2d 136, 140 (5th Cir. 1990) ("[A] party not possessing a right under substantive law is not the real party in interest with respect to that right and may not assert it.").

Plan, and plan documents regarding matters as to which there is a substantial and immediate controversy.

Without the bankruptcy court's interpretation of the meaning of the Plan, the Trust will be faced with a fiduciary dilemma, in that it will be uncertain how to treat its beneficiaries, the Unknown Claimants. This dilemma exists because the trustees cannot know whether these future claimants ultimately will have a remedy against New-NGC, and, as a result, the trustees cannot know, with any certainty, whether the Trust must reduce the current pro-rata distribution under the Alternate Facility.

Therefore, the Trust properly has brought the current declaratory judgment action seeking a determination of whether, under the Confirmation Order and Plan, it can count on New-NGC to pay any of the Unknown Claims. Accordingly, the Trust is a real party in interest and has standing.

III.

A.

The parties dispute the standard of review of the bankruptcy court's interpretation of its 1993 Confirmation Order. New-NGC argues that because the interpretation of a court order is purely a question of law, our review must be *de novo*.[3]

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[3] *See In re Schimmelpenninck*, 183 F.3d 347, 354 (5th Cir. 1999) (holding that in reviewing a bankruptcy court's order, we should perform "the same task as did the district court: review the bankruptcy court's findings of fact for clear error and issues of law de novo").

The Trust responds by arguing that a court's interpretation of its own order should be entitled to deference if it is not plainly contradicted by the Plan documents.[4] The Trust notes that the bankruptcy court presided at the confirmation hearings, considered the relevant factual and legal arguments, made extensive findings and conclusions in connection with confirmation, and so developed a comprehensive understanding of the Plan. Thus, the Trust urges that a deferential standard is "eminently proper."

The proper reconciliation of these two positions is that we should review *de novo* the purely legal issues—e.g., the effect of the documents on New-NGC's liability for Unknown Claims—but should defer to the bankruptcy court's reasonable resolution of any ambiguities in those documents. Because New-NGC is correct that the bankruptcy court's ultimate determination of the meaning of the Plan and Confirmation Order is a legal one, however, the documents must truly be ambiguous, even in light of other documents in the record, before we will defer.

B.

New-NGC argues that the district court erred in deciding that the Plan provided that New-NGC would be held liable for any Unknown Claims that are unresolved following exhaustion of the Trust's assets. New-NGC asserts that rather than being liable under the bankruptcy Plan, it should be liable only if an asbestos claimant can

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[4] *See County of Suffolk v. Stone & Webster Eng'g Corp.*, 106 F.3d 1112, 1115 (2d Cir. 1997).

overcome the additional hurdle of proving successor liability under applicable state law.

In adopting the Trust's position on this issue, the bankruptcy court admitted that there are no express statements in the Plan or Confirmation Order that affirm New-NGC's liability. Nevertheless, the court found such liability "implicit" in the Plan, reasoning that because it previously had rejected a permanent injunction against Unknown Claims, "the only reading that gives meaning to [the] findings of fact and conclusions of law [is] that this plan as confirmed by this court contemplated New NGC liability for claims not paid by the Trust and not otherwise discharged."[5]

The district court affirmed because, as it explained, the Confirmation Order stated that

> New NGC shall not be subject to the commencement or continuation of litigation by any person on or on account of Unknown Asbestos Claims *pending exhaustion of the remedy or remedies provided by the [Trust].* The clear implication of this statement is that once the [Trust] is exhausted, Unknown Claimants may commence litigation against [New-NGC].

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[5] In addition to challenging the underlying interpretation, New-NGC argues that it is never proper for a bankruptcy court to make an "implicit" ruling, particularly where that ruling conflicts with other express statements in the Plan. While this argument is thus styled as a separate ground for reversal, it relies wholly on the conclusion that the underlying interpretation is wrong. As a consequence, we need not address it separately.

(Internal citations omitted.) In defending the bankruptcy court's and district court's decision, the Trust also argues that we should view New-NGC's current position as an attempt to relitigate the issues that were squarely presented to, and expressly rejected by, the bankruptcy court in the 1993 Plan and confirmation proceedings. The Trust points out that the 1993 order was never appealed and is, therefore, the law of the case.

But just because the Confirmation Order and Plan are binding does not answer the more difficult question of what those documents mean. Our duty is to read the Plan documents to determine what is the best interpretation of the court's intent with respect to New-NGC's liability for Unknown Claims. In this respect, New-NGC correctly notes, as an initial matter, that there are at least three positions the Plan could have adopted: (1) New-NGC could be immune from Unknown Claims; (2) New-NGC could be liable for Unknown Claims that were not resolved by the Trust, but only to the extent of state law successor liability; or (3) New-NGC could have been liable for all Unknown Claims once the Trust was exhausted.

The bankruptcy court rejected the first of these positions when it determined that it did not have jurisdiction permanently to enjoin Unknown Claimants from suits against New-NGC. The bankruptcy court, district court, and the Trust make an immediate leap from the rejection of this first position to an adoption of the third position as the one "implicit" in the 1993 orders. This leap is apparent in the Trust's argument that because the commercial creditors' BT Committee opposed the Channeling Order and its temporary injunction, they

> knew that under the confirmed Plan New-NGC would be liable for Unknown AD Claims to the extent, if any, that the Trust proved unable to resolve those Claims. Indeed, they objected (unsuccessfully) to NGC's third Technical Modifications on this very ground, asserting that the modification would subordinate the majority of the claims currently held by NGC's bond and trade creditors to an undetermined amount of asbestos liability.

The Trust's conclusion does not flow inevitably, however, from the commercial creditors' objections. It is possible that these creditors were objecting to the imposition on New-NGC of *any* risk of liability, including the (apparently) smaller risk of successor liability under state law. Because the previous Draft Plan would have provided New-NGC with *absolute* immunity from *all* asbestos claims, either the second or third interpretations would represent a less desirable reorganization plan for these creditors, and either would have motivated them to object.[6] Thus, New-NGC argues that it was erroneous for the bankruptcy court to treat the failure to create a

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[6] The dissent ignores this observation, thereby reflecting same error as did the bankruptcy court, the district court, and the Trust, stating that "over the protest of Gypsum creditors who would own the New-NGC the bankruptcy court refused to protect it from future unknown claims." Like the Trust, however, the dissent assumes this conclusion solely from the fact that the court rejected a permanent injunction against Unknown Claims, and it fails to point to any language in the approved Plan or Confirmation Order that indicates that New-NGC, instead of accruing the more limited form of state-law successor liability, would be liable for all Unknown Claims once the Trust was exhausted.

permanent injunction against future asbestos claims as the equivalent of imposing liability for those claims on New-NGC.

Likewise, the isolated statements pointed to by both parties do little to resolve the interpretive question. The Trust emphasizes a statement contained in the transcript from the January 1993 bankruptcy ruling that "Non-Bankruptcy Code claimants must be able to pursue their remedies in the future after the exhaustion of the trust." But once again, either the second or third interpretation would be consistent with this statement, for the court could have intended that state-law successor liability would be sufficient, or, alternatively, the court could have been referring to an immediate liability on exhaustion of the Trust.

Somewhat more informative are statements New-NGC points to from the February 1993 hearing, wherein the court specifically addressed the issue of New-NGC's liability for Unknown Claims should the Trust be exhausted, noting:

> The Court has already provided that if these future claimants are [not] satisfied, there is no permanent injunction and then that triggers the dispute is new NGC *a successor*, what liability is there under whatever the *applicable corporate law* would be.... My concern is if you start getting into the dispute on document drafting, you will be necessarily changing by corporate document what the Court would anticipate would just be whatever the application is of the *appropriate jurisdiction statute*.... My only concern is if you're not in dispute as to what to put on any document with a new entity, maybe

> that's simply left better to the application of *whatever governing law would be, nonbankruptcy governing law*, in the event that there's anything to fight about, in the event that some claims in the future . . . they can proceed with their rights, and new NGC can *defend and say we're not a successor*.

(Emphasis added.) New-NGC asserts that these discussions form the context for the final version of the Plan, the Confirmation Order, and the APA and that the bankruptcy court's comments reflect its understanding, at that time, that even though there would be no permanent injunction preventing Unknown Claimants from seeking damages from New-NGC if the Trust were exhausted, nevertheless those claims against New-NGC would still have to meet the requirements for state-law successor liability.

The Trust downplays these comments, suggesting they are merely part of a discussion about what was then a completely speculative and hypothetical event (the likelihood that the Trust would ever be exhausted). It argues that these statements cannot, as a matter of law, substitute for what is in the Confirmation Order and Plan. The Trust is correct that the Plan and Confirmation Order form the basis of the binding agreement between the debtors and creditors, and any determination of the extent of New-NGC's liability for the Unknown Claims must flow from those documents. Nonetheless, where there is ambiguity in the documents, and especially where there is a dispute as to what the parties understood them to mean, extrinsic evidence such as this should inform our analysis.

That notwithstanding, the best indication of the bankruptcy court's intent with respect to these Unknown Claims still can be found in the documents themselves. First, and most importantly, New-NGC points to the Channeling Order, because it is the disputed provision that represents the most significant modification of the Draft Plan. The Channeling Order provided as follows:

> Channeling Order—Unknown Disease Claims.
>
> (1) Injunction and Channeling Order.
>
> Pursuant to Section 6.5(b) of the Plan, all Persons who have held, hold, or may hold Unknown Asbestos Disease Claims are made beneficiaries of the [Trust] and, pending exhaustion of the remedies of that Fund to resolve Unknown Asbestos Disease Claims, are enjoined (subject, however, to the provisions of Section 10(b)(2) of this Order) on and after the Confirmation Date from . . . commencing or continuing in any manner any action or other proceeding of any kind with respect to such Unknown Asbestos Disease Claim against the Debtors, New NGC, Reorganized NGC, or any of their respective officers, directors, employees, representatives, Affiliates or Subsidiaries (other than Austin or its Subsidiaries), the Insurance Companies, *or any other Person* . . . .
>
> (2) Limitations on Injunction and Channeling Order Regarding Asbestos Disease Claims. Nothing contained in Section 10(b)(1) of this Order, however, shall preclude an Unknown Asbestos Disease Claimant from pursuing his rights, if any, *under applicable non-bankruptcy*

> *law against any Person* who may be liable to such Unknown Asbestos Disease Claimant after exhausting the remedy or remedies provided by the [Trust].

(Emphasis added.)

New-NGC points to the quoted language for its conclusion that Old-NGC's tort liability to non-Code claimants does not attach automatically to New-NGC. Specifically, New-NGC notes that section 10(b)(2) covers *any* "Person," not just New-NGC, and that the rights of Unknown Claimants are limited to "rights, if any, under applicable non-bankruptcy law." New-NGC argues that, as a result, because the Trust must recognize that no automatic liability arose against all "Persons,"[7] therefore the Trust must argue that the Channeling Order somehow designated that only New-NGC would automatically succeed to Old-NGC's liabilities. But as the plain language of that order reflects, nothing in these provisions singles out New-NGC for special treatment, and New-NGC instead is dealt with in § 10(b)(2) the same as is any other Person.

New-NGC correctly observes that, consequently, the only sensible reading is that all Persons, including New-NGC, were exposed to the possibility that Unknown Claimants might some day be allowed to pursue a remedy against them *if one existed under applicable non-bankruptcy law*. In contrast, the Trust's reading would lead to the unlikely conclusion that the bankruptcy court

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[7] Significantly, "Person" is defined broadly, under the Plan, as "any individual, firm, corporation, association, partnership, joint venture, trust, or other entity."

intended that all "Persons" would be automatically liable if the Trust's assets were exhausted.

The next provision pointed to by New-NGC is section 6 of the Confirmation Order, which expressly approves the APA and orders that the assets sold thereunder are to be transferred to New-NGC "free and clear of all Liens, Claims, Interests and other liabilities, obligations, charges or encumbrances thereon or thereagainst . . . to the maximum extent permitted by the Bankruptcy Code." Because New-NGC, a newly-created corporation, cannot automatically succeed to the liability of Old-NGC without some affirmative act (whether explicit or implicit) of the bankruptcy court, this provision further supports New-NGC's argument that the bankruptcy court never intended to take such necessary action to transfer liability.

In fact, the natural inference from this provision is that the court intended New-NGC to assume only "Liens, Claims, Interests and other liabilities" that were *specifically* assigned or transferred in other parts of the Confirmation Order; otherwise, New-NGC would be "free and clear . . . to the maximum extent permitted by the Bankruptcy Code." The plain language of the Confirmation Order therefore refutes the bankruptcy court's finding of "implicit" liability.

As further support for its position, New-NGC notes that section 5.2(d) of the Plan provides that New-NGC is not responsible for asbestos liabilities: "Upon consummation of the Merger and this Plan, New-NGC shall perform all of the obligations of the Debtors under this Plan (*except for the obligations regarding the Asbestos Claims which shall be the sole responsibility of the [Trust]*." (Emphasis added.) "Asbestos Claims" are de-

fined in the Plan to include both current and Unknown Claims.

Finally, for textual support, New-NGC relies on provisions of the APA, which were approved by the bankruptcy court in the Confirmation Order. Section 2.1(b) of the APA states that New-NGC will not have liability for any asbestos claims (including Unknown Claims): "Exclusions to Assumptions. Notwithstanding anything contained in this Section 2.1 to the contrary, [New-NGC] shall not assume, covenant to pay, perform, observe the terms of, satisfy and/or discharge any liability or obligation of [Old-NGC] to the extent such liability and obligation: (i) relates to Asbestos Claims. . . ." The APA adopted the definition of "Asbestos Claims" in the Plan, and, as we have said, that term includes Unknown Claims.

In challenging all these statements supporting New-NGC's position, the Trust relies primarily on the same reasoning as did the district court, which felt these statements and provisions are taken out of context and do not reflect a coherent reading of the documents as a whole.[8] As the court stated,

> When viewed in isolation, certain provisions of the Confirmation Order, the Plan and the Asset

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[8] Notably, the dissent also offers no theory of how or why we should ignore the plain language of the Plan documents to reach the result desired by the Trust. Instead, the dissent criticizes the majority for having "chosen their own meaning of the 1993 order," but it does not tell us what is erroneous about our interpretations of the Channeling Order, section 6 of the Confirmation Order, section 5.2(d) of the Plan, or section 2.1(b) of the APA.

> Purchase Agreement arguably support the appellant's arguments that New NGC emerged from the bankruptcy proceedings without any liability for unknown asbestos claims. However, as the bankruptcy court explained, "the plan and its implementing documents must be read coherently, giving meaning to all its provisions and terms, but doing so consistent with the confirmation order, which governs. The plan and its implementing documents cannot be read to render any provision of the confirmation order meaningless or superfluous."

(Internal quotations omitted.)

In so stating, the district court erred in at least two respects. First, New-NGC does not claim that it "emerged from the bankruptcy proceedings without any liability for unknown asbestos claims." Although this was the first of the three positions the bankruptcy court could have taken, all sides acknowledge that that option was expressly rejected when the permanent injunction was denied. Instead, New-NGC takes a more restrained position, asserting that it emerged with a more limited form of liability, state-law successor liability.

Second, the bankruptcy court's and district court's desire to avoid "rendering any provision of the confirmation order meaningless or superfluous" is commendable, but that interpretive tool leads to a conclusion opposite to the one those courts reached. To reject the multiple statements advanced as support by New-NGC as contrary to the "implicit" meaning of the Confirmation Order is to render *those* statements meaningless or superfluous. In contrast, neither the Trust nor the bankruptcy or district court has pointed to language that

would be superfluous under New-NGC's more modest reading of successor liability.

The district court decided that New-NGC's theory would render the entire Channeling Order meaningless, reasoning that "if New NGC was not to have any liability for unknown asbestos claims, the channeling order would have been unnecessary." But once again, this logic is built on the faulty premise that New-NGC is arguing for absolute immunity. As we have shown, the rejection of the permanent injunction, followed by imposition of the Channeling Order, is just as consistent with the theory that the bankruptcy court wanted to impose at least state-law successor liability on New-NGC. Our textual analysis of the Channeling Order demonstrates that the state-law-successor-liability theory was the most reasonable interpretation.

Similarly deficient is the district court's conclusion that because "the Confirmation Order barred punitive damages by unknown asbestos claimants against New-NGC, this indicates that the order contemplated that New-NGC would be liable for other types of damages." While this statement is correct, it does nothing to undermine New-NGC's state-law-successor-liability theory; the bankruptcy court simply may have been closing the door to punitive damages even under the more limited form of non-bankruptcy-law liability.

On the other hand, the Trust may be correct that the bankruptcy court's bar on punitive damages evinces an intent on the court's part to impose liability on New-NGC. That is, if the court intended to leave all questions of New-NGC's liability to state-law successor doctrine, it might seem odd that it would express any opin-

ion on whether punitive damages could be recovered under state law.

But to the extent that this observation about intent is correct, we should nevertheless reject it as a matter of law. This is so because once the bankruptcy court had determined that Unknown Claims were not "claims" within the meaning of § 101(5) of the Bankruptcy Code, it no longer retained jurisdiction to limit punitive damages awards in favor of these claimants.[9]

New-NGC correctly notes that it is inherently inconsistent for the bankruptcy court to rule that it is without the power permanently to enjoin Unknown Claims because they do not fit within section 101(5), but then to hold, nevertheless, that New-NGC will be liable for those claims once the Trust is exhausted. This impermissibly benefits Unknown Claimants, who do not hold Code claims, in relation to other non-Code creditors, who would have to prevail under state-law successor theories. Similarly, the district court's bar on punitive damages for Unknown Claims impermissibly disadvantages Unknown Claims relative to other non-Code creditors who are free to pursue punitive damages. Thus, we

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[9] The dissent argues that this "is a curious response to the obvious point that the bankruptcy court is assuming the same liability of New-NGC in the channeling facility, rather than contemplating 'state-law' litigation." But the dissent misses the point that the bankruptcy court could not impose liability on New-NGC for Unknown Claims, which were not properly within the bankruptcy system at all. Thus, even if the bankruptcy court were not contemplating "state-law" litigation, it did reason that it had no jurisdiction over future claims, and, accordingly, those claims should be handled outside of bankruptcy.

reject the argument that the punitive-damages bar has any bearing on New-NGC's liability for Unknown Claims, which were determined to be outside of the bankruptcy court's power to enjoin.

In a failed attempt at its own textual analysis, the Trust argues that because the court recognized that "New NGC may transfer additional assets to the Trust in the future," therefore this right to add funds would make sense only if New-NGC also has liability for the Unknown Claims. New-NGC cogently points out, however, that the right to add funds is a recognition not that New-NGC would retain liability for Unknown Claims, but instead that it provides New-NGC an option to shield itself even from successor liability.

If New-NGC determines that it would be better off funding the Trust than defending against future state-law asbestos claims,[10] the Plan affords it this option. The court's statement is consistent, therefore, with New-NGC's theory that the bankruptcy court believed that New-NGC might want to retain the ability to extend the temporary injunction by continuing to fund the Trust.

Thus, the Trust and district court point to no provisions of the Confirmation Order or the Plan that lead to the conclusion that New-NGC was necessarily to be liable for the Unknown Claims should the Trust fail to satisfy them. Neither attempts to argue for alternative interpretations of the provisions set forth by New-NGC; instead, they rely solely on their theory that these are

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10 For example, New-NGC may determine that its expected costs of litigation exceed the amount of funding needed to ensure continued viability of the Trust.

mere "isolated" statements in the documents. New-NGC, on the other hand, points to multiple statements in the record, and numerous provisions in the relevant documents, that are consistent *only* with its position that it should not be liable to the Unknown Claims unless they can establish state-law successor liability.

Proper textual interpretation does not allow us to ignore those statements or to adopt an "implicit" meaning that would render all these provisions meaningless, and we need not defer to the bankruptcy court's interpretation of this unambiguous text. Nor does our interpretive role require us to ignore other extrinsic evidence, such as the bankruptcy court's discussion of non-bankruptcy law and successor liability, that is consistent with the text.

In light of the Plan and Confirmation Order, then, it is unlikely that the bankruptcy court intended that non-Code claimants, who may have no right to recover against New-NGC under applicable state law, nevertheless are entitled automatically to a Code remedy against New-NGC. Thus, all of these sources lead to the conclusion that, although the bankruptcy court determined that it did not have the power permanently to enjoin Unknown Claimants from seeking recovery from New-NGC on exhaustion of the Trust, the court did not impose any certain liability on New-NGC.

C.

In the alternative, the Trust asserts that the structure of Old-NGC's reorganization Plan makes New-NGC the *de facto* reorganized debtor. Relying on *Lemelle v. Universal Mfg. Corp.*, 18 F.3d 1268, 1274, 1278 (5th Cir. 1994), the Trust notes that, under bankruptcy law, the

reorganized debtor remains liable for any debt that is not discharged under the plan. Thus, the Trust explains that, in effect, the rights and obligations of Old-NGC were transferred to New-NGC, and, because the Unknown Claims were not discharged by the Plan, New-NGC will be liable for them on exhaustion of the Trust.

As support, the Trust points to the following evidence: (1) New-NGC was capitalized with approximately $350 million of assets of Old-NGC; (2) to receive favorable tax treatment, New-NGC was required to carry on the business of Old-NGC; (3) New-NGC retained Old-NGC's attorney-client privilege, even as against Old-NGC and ACMC; (4) Old-NGC's management had authority under the Plan to elect two of the directors of New-NGC, and the remaining directors were elected by the commercial creditors; (5) New-NGC retained the corporate name "National Gypsum Company"; (6) New-NGC's stock was not sold to unrelated third parties in an arms-length transaction, but instead was distributed to Old-NGC's commercial creditors, and the same person executed the APA for both the buyer and seller; and (7) the bankruptcy court stated that New-NGC would carry on and preserve the business of the debtor and that only those assets given to the Trust would be liquidated.

While all this evidence is consistent with the Trust's theory that New-NGC is the reorganized debtor following bankruptcy, New-NGC points to its own evidence that Old-NGC, not New-NGC, emerged from the bankruptcy proceeding as "Reorganized NGC" under the Plan. First, New-NGC cites the plain language of the bankruptcy documents. It notes that the Plan defined "Reorganized NGC" as "NGC, on and after the Effec-

tive Date, which entity shall be . . . the successor to NGC for all purposes." Thus, in a prior appeal, we recognized that the Trust "became the sole shareholder of the reorganized National Gypsum (which, in turn, became known as 'Asbestos Claims Management Corporation (ACMC)'." *Insurance Co. of N. Am. v. NGC Settlement Trust (In re Nat'l Gypsum Co.)*, 118 F.3d 1056, 1059 (5th Cir. 1997). In contrast, "New NGC" means "a Delaware corporation to be formed pursuant to this Plan, and which shall do business from and after the Effective Date as '*National Gypsum Company.*'"

Similarly, the Trust Agreement provides that "the purpose of the Trust is to assume any and all liabilities *of the Debtors*" (emphasis added), and the Channeling Order provides for an injunction of actions against, among others, "the Debtors, New NGC, [or] Reorganized NGC," suggesting that New-NGC and the reorganized debtor are not the same entity under the Plan. Thus, treating New-NGC as the reorganized debtor is contrary to the plain language of the documents.

New-NGC also points out that the Trust's reliance on *Lemelle* is misplaced and that that decision actually supports New-NGC's contention that Old-NGC/ACMC remains the reorganized debtor. In *Lemelle*, the debtor corporation, Winston, sold its operating assets, during bankruptcy, in two separate transactions, leaving it with miscellaneous non-operating assets. *See Lemelle*, 18 F.3d at 1270. Following the discharge, Winston (through its successor) was sued for an act it had committed before the bankruptcy. It defended, arguing that it had not succeeded to any pre-bankruptcy liability, because it had not retained the operating assets of the debtor, and therefore it was liquidated. We rejected that

argument, concluding that Winston had not been liquidated and that the liability was not one that had been discharged in the Winston bankruptcy. *See id.* at 1273.

In rejecting Winston's argument that it had been liquidated, we refused to apply the "de facto liquidation" theory expressed in *Erie Lackawanna Ry. v. Henning,* 803 F.2d 881 (6th Cir. 1986). Instead, we concluded that the Sixth Circuit's theory—which provided, in the "admittedly unique" situation of a railroad debtor, that although the debtor "had gone through reorganization in form, in substance it had been liquidated"—lacked applicability outside the Rail Act context. *See Lemelle*, 18 F.3d at 1273 n.3. The lack of a formal liquidation in *Lemelle*, then, was dispositive of Winston's claim that a liquidation had occurred. *See id.* at 1273.

Thus, far from supporting the Trust's position, *Lemelle* is an example of the original debtor's remaining liable for non-Code claims, even where the operating assets were sold to another party. Indeed, the sale of the operating assets in *Lemelle* did not even contain the same restrictive language found in New-NGC's sale agreement with the commercial creditors.[11] Conse-

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[11] In *Lemelle*, we ultimately rejected the argument that the party that had purchased Winston's operating assets was liable for the pre-bankruptcy claims, because the terms of the purchase agreement were not properly submitted by Winston in response to summary judgment. *See Lemelle,* 18 F.3d at 1274. Nevertheless, the purchase language that did appear in the order was not as restrictive as that in the APA, *see id.*, and the underlying point remains true: The Trust's theory that non-Code claims were assumed automatically by the purchaser of the debtor's operating assets is at least as doubtful in this case as it was in *Lemelle.*

quently, *Lemelle* teaches that, because the Trust cannot establish that Old-NGC was formally liquidated, therefore Old-NGC remains the reorganized debtor following bankruptcy.

As we have pointed out, the APA provided for a limited assumption of liabilities and expressly disavowed assumption of any current or future asbestos claims. Moreover, Old-NGC was no "empty shell" following bankruptcy: It retained hundreds of millions of dollars of assets, including the stock of the Austin Company, and it is still paying asbestos claims and suing insurance companies. Nothing about these circumstances suggests that the Trust and ACMC did not continue as Old-NGC's reorganized debtor.

The Trust makes much of the fact that the sale of Gold Bond was to Old-NGC's commercial creditors; it argues that because the sale was not an "arms-length" transaction, we should not allow these creditors to escape the conclusion that New-NGC is just a reorganized form of the old debtor. New-NGC cannot be a new corporation free from Old-NGC's non-discharged debts, the Trust argues, because the commercial creditors paid no new consideration for the operating assets. Thus, by concluding that New-NGC is liable only under a state-law successor theory, we are shielding New-NGC's new owners—who were Old-NGC's old commercial creditors--from non-dischargeable liabilities. The Trust warns that we are sanctioning a "ruse" and inviting fu-

ture debtors to advocate bankruptcy plans that incorporate this strategy.[12]

Much of this rhetoric is dependent on the underlying argument that New-NGC, and not Old-NGC, is the reorganized debtor. But the Trust offers no principled reason why the fact that Gold Bond was purchased by Old-NGC's commercial creditors should outweigh all the textual evidence that Old-NGC/ACMC is the reorganized debtor under the Plan. It seems that the Trust's primary concerns seem to be with bankruptcy policy and the implications for future reorganization plans.

There is, however, good reason why we would want to encourage these types of reorganizations and to enforce the express terms of the deal to which the parties have agreed. All sides were adequately represented during bankruptcy proceedings, and legal representatives were appointed for current and future asbestos claimants and for commercial creditors and the company.[13] Nego-

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[12] In this way, the Trust seemingly hopes to equate this with earlier warnings in other asbestos litigation. For example, in *Flanagan v. Ahearn (In re Asbestos Litig.)*, 90 F.3d 963, 994 (5th Cir. 1996) (Smith, J., dissenting), *vacated*, 521 U.S. 1114 (1997), appeared the warning that "the majority's unequivocal approval of Fibreboard's litigation strategy undoubtedly will lead other financially threatened companies throughout the nation to utilize it as a road map for sheltering their assets and improperly restricting the rights of their present and future victims." (Internal quotations and punctuation omitted.)

[13] This is in stark contrast to the facts of *Flanagan*, in which it was noted that, by removing the settlement from the bankruptcy context, Fibreboard denied the class of asbestos claim-

[Footnote continued on next page]

tiations were extensive, and the legal representative of the Unknown Claimants successfully blocked court approval of the Draft Plan, which permanently would have enjoined even state-law successor claims against New-NGC. Still, despite this setback, the commercial creditors were willing to give more in value to Old-NGC for Gold Bond than were any other purchasers, and we should be hesitant to change the terms of the deal after the fact just because subsequent developments in the *Georgine* settlement have resulted in the Unknown Claims' being underfunded in the Trust.

This is not a case in which Old-NGC has won approval of a plan to bail out its share holders, "forcing asbestos victims to surrender their claims in exchange for a meager" portion of the company's assets. *See Flanagan*, 90 F.3d at 993 (5th Cir. 1996) (Smith, J., dissenting). Instead, Old-NGC's chapter 11 bankruptcy was motivated at least as much by the $1.1 billion owed to bond and trade creditors as by the $800 or $900 million estimated liability for current and future asbestos disease claims. The bankruptcy court adopted a Plan whereby all the current and future asbestos claims were expected to be paid in full by the Trust, while the bond and trade creditors received only $350 million in assets in exchange for their $1.1 billion in claims.[14] This $750

[Footnote continued from previous page]
ants the right to vote on the proposed settlement. *See id.* at 996 (Smith, J., dissenting).

14 Thus, because the bankruptcy court did not foresee that the CCR would be disapproved and the Trust would be insufficient to fund both current and future asbestos claims, it is not, as the dissent suggests, "incredible to believe that the bankruptcy

[Footnote continued on next page]

million reduction in debt was sufficient "consideration," notwithstanding the Trust's arguments to the contrary.

Although the CCR ultimately was disapproved, there is no reason to believe that Unknown Claimants are now getting a worse deal under the Alternate Facility than commercial creditors originally received under the Plan; there are, after all, hundreds of millions of dollars in Insurance, Austin, and other assets in the Trust. Consequently, none of the Trust's concerns about the implications of shielding the bond and trade creditors from more liability is especially compelling, and those concerns certainly are insufficient to overcome the plain language of the Plan documents.

IV.

[Footnote continued from previous page]
court would create this new operating company with debtor assets, after holding that it had no authority to extinguish unknown asbestos claims of the debtor, and then leave it to state law governing successor liability to resolve the future asbestos liability of its mutant creation." Rather, the bankruptcy court simply entered a compromise agreement whereby the largest group of creditors, the commercial creditors, would receive something of value in return for their $1.1 billion in debt, while the asbestos claimants would receive everything else.

Then, when subsequently it became apparent that the Trust would be insufficient to fund Unknown Claims, the bankruptcy court unreasonably altered the meaning of the Plan documents to hold that future asbestos claimants could go after New-NGC. While this impulse may have been noble, and perhaps even socially desirable, the bankruptcy court cannot now ignore the plain meaning of the documents that created New-NGC as a separate operating company with no liability as a reorganized debtor.

In the end, then, both of the Trust's arguments fail. First, notwithstanding the bankruptcy and district courts' findings to the contrary, there is nothing "implicit" in the Plan documents or other bankruptcy court orders that provides that New-NGC will automatically succeed to Old-NGC's liability for Unknown Claims. Instead, the express terms of the Plan compel the opposite conclusion—i.e., that New-NGC will be liable only under non-bankruptcy, state-law successor liability. We see no reason to ignore the plain meaning of these Plan documents.

Second, Old-NGC and New-NGC are not the same entity. Under the Plan, Old-NGC became ACMC, a subsidiary of the NGC Settlement Trust. New-NGC was formed as a new corporation created to purchase the assets of Gold Bond for Old-NGC's commercial creditors. Pursuant to the Asset Purchase Agreement, New-NGC did not assume liability for asbestos claims, whether known or unknown. In exchange, its shareholders surrendered approximately $750 million in net claims it held against Old-NGC, and it took $350 million in assets "free and clear" of all liens. Thus, because there are no other provisions in the Plan that allocated the liabilities for asbestos claims from Old-NGC to New-NGC, New-NGC cannot be considered to have assumed those debts, and it is not the reorganized debtor.

By contrast, the Trust documents expressly contemplate that the Trust and its subsidiary, Old-NGC/ACMC, assume liability for all asbestos claims. The Plan also expressly provides that Old-NGC/ACMC is "Reorganized NGC." The Trust has not presented any compelling evidence why we should ignore the plain meaning of all these documents, nor has it presented a plausible argu-

ment that it is not the reorganized debtor following bankruptcy.

Accordingly, the judgment of the district court, affirming the order of the bankruptcy court, is REVERSED and REMANDED to the district court for further proceedings, as appropriate.

REAVLEY, Circuit Judge, dissenting:

The majority have chosen their own meaning of the 1993 order of the bankruptcy court by leaving future asbestos claimants to tort actions against Gypsum without recourse to the claims resolution facility of the bankruptcy order. I would follow the bankruptcy court's own construction of its order and avoid adding to the delay and lawyer fees for asbestos victims, a result that joins the ongoing judicial contribution to the asbestos debacle.[1] I dissent.

The 1993 order confirming the plan provided in section 9(b) that New-NGC "shall not be subject to the commencement or continuation of litigation by any person on or on account of Unknown Asbestos Disease Claims pending exhaustion of the remedy or remedies provided by the NGC Asbestos Settlement Fund," i.e., the fund administered by the Trust. Again, in the "channeling order" that is section 10(b) of the confirmation order, all persons holding an unknown asbestos claim are enjoined from suit against New-NGC "pending exhaustion of the remedies of the" Trust settlement fund. If the court was not directing that, if necessary,

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[1] For example, *see Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

New-NGC assets followed Trust assets in the settlement facility, it was lifting its injunction and allowing an entirely new track for the claimants who waited for the second track to begin. While lawyers for the claimants could not count on better recoveries when the track changed, because New-NGC had the option of adding assets to the Trust Fund, the lawyer fees could be larger. This able bankruptcy judge would have recognized the vice of that scheme and would have avoided it.

When the financial creditors, who were to own New-NGC, objected to the court's channeling order for the reason that it "subordinates the majority of the claims currently held by NGC's bond and trade creditors to an undetermined amount of asbestos liability," the court rejected this objection. Over the protest of Gypsum creditors who would own the New-NGC the bankruptcy court refused to protect it from future unknown claims but, as if the bankruptcy court had not decided the matter, this majority opinion holds that the bankruptcy court did not "transfer liability." But then the majority relents and restrains the transfer to the more limited "state-law successor liability."

Then there is the provision of the order at section 9(c) that expressly bars punitive damages by unknown claimants against New-NGC. The majority opinion dismisses this on the ground that the bankruptcy court had no authority to limit those damage awards because they were not "claims" within the meaning of the Bankruptcy Code. That is a curious response to the obvious point that the bankruptcy court is assuming the same liability of New-NGC in the channeling facility, rather than contemplating "state-law" litigation.

The bankruptcy court, in ruling in the pending adversary action, said: "With all due respect to the learned and considered arguments of counsel, the only reading that gives meaning to these findings of fact and conclusions of law are that this plan as confirmed by this court contemplated new NGC liability for claims not paid by the Trust and not otherwise discharged." The district court followed the law and gave deference to the bankruptcy court's interpretation of its own confirmation order. *See Farmhand, Inc. v. Anel Eng'g Indus., Inc.*[2] ("We see no basis for substituting our judgment for that of the district judge in interpreting his own order."). The bankruptcy judge will find demoralizing the majority conclusions that he "never intended" or "wanted to impose" a channeling liability after exhaustion of the Trust assets, or that the judge would reach this strange "state-law successor liability" and then forget that he had so ruled. Actually, it is incredible to believe that the bankruptcy court would create this new operating company with debtor assets, after holding that it had no authority to extinguish unknown asbestos claims of the debtor, and then leave it to state law governing successor liability to resolve the future asbestos liability of its mutant creation, without leaving so much as a footnote in the controlling documents suggesting such an intent. This appellate court should reject the incredible and stay with the judgment of the bankruptcy court.

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[2] 693 F.2d 1140, 1146 (5th Cir. 1982) (quoting *SEC v. Sloan*, 535 F.2d 679, 681 (2d Cir. 1976)).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
NATIONAL GYPSUM COMPANY, AANCOR HOLDINGS, INC.,	§	
DEBTORS.	§	
NATIONAL GYPSUM COMPANY,	§	CIVIL ACTION NO. 3:98-CV-1032-P
APPELLANT,	§	
v.	§	
NGC SETTLEMENT TRUST and THE ASBESTOS CLAIMS MANAGEMENT CORPORATION,	§	
APPELLEES.	§	

MEMORANDUM OPINION AND ORDER
[Entered June 2, 1999]

Now before the Court is Appellant National Gypsum Company's ("Appellant" or "New NGC") appeal from the United States Bankruptcy Court for the Northern District of Texas, Dallas Division's ruling in the underlying adversary proceeding (the "Adversary Proceeding"). Appellant filed its initial brief May 13, 1998. Appellees NGC Settlement Trust and the Asbestos

Claims Management Corporation ("Appellees") filed their response on June 15, 1998, and Appellant filed its reply on July 2, 1998. Appellant seeks a reversal of the Bankruptcy Court's judgment in the Adversary Proceeding. Specifically, New NGC appeals the Bankruptcy Court's determinations that: 1) the chapter 11 plan of reorganization (the "Plan"), the documents implementing the Plan (the "Plan Documents") and the Order entered by the Bankruptcy Court in 1993 pursuant to 11 U.S.C. § 1129 confirming the Plan (the "Confirmation Order") "implicitly" imposed or maintained liability on New NGC for unknown asbestos disease claims ("Unknown Claims") to the extent the Trust is unable to resolve such claims, 2) it had jurisdiction to hear and Appellees had standing to bring the Adversary Proceeding, and 3) Jude Felsenthal need not recuse/disqualify himself from the action.

BACKGROUND

On October 28, 1990, National Gypsum company and its parent holding company, Aancor Holdings, Inc., each filed a petition for relief under chapter 11 of the Bankruptcy Code. The cases were subsequently consolidated by the bankruptcy court, and on March 9, 1993 the bankruptcy court entered an order confirming the plan of reorganization. ("Confirmation Order").

On September 4, 1992, the debtors submitted their first Amended and Restated Plan of Reorganization. ("The Plan"). The Plan provided for the division of National Gypsum's assets between two entities. Old National Gypsum ("Old NGC") was to keep insurance policies and the Austin Company, a subsidiary of National Gypsum. The Plan also provided for the creation of New National Gypsum ("New NGC") which acquired

the majority of operating assets and the ongoing business of National Gypsum. New NGC is a separate entity organized under the laws of Delaware. New NGC was to be owned by the bond and trade creditors of the debtor, National Gypsum. The management team of National Gypsum remained as the management team of New NGC. The Plan further created NGC Settlement Trust ("The Trust") to own the stock of Old NGC and to settle asbestos claims against National Gypsum. The Plan proposed that all asbestos claims, whether known or unknown, would be discharged and subject to a permanent injunction prohibiting future litigation against any person or entity. Thus, under the Plan, known and unknown asbestos claimants could only look to the Trust for their remedies. At a heading in January 1993, the bankruptcy court informed the parties that the provisions of the Plan purporting to discharge and enjoin unknown asbestos claims were not permissible under applicable bankruptcy law. The bankruptcy court determined that unknown asbestos claims were not "claims" within the meaning of Section 101(5) of the Bankruptcy Code and, hence, could not be discharged or subject to the permanent injunction as proposed by the Plan. Subsequent to this bench ruling by Judge Felsenthal, on March 5, 1993, the debtors submitted the "Third Technical Modifications of the First Amended and Restated Joint Plan of Reorganization of National Gypsum Co., Inc. and Aancor Holdings, Inc." ("The Third Modifications"). On or about March 8, 1993, objections to the Third Modifications were filed by the bond and trade creditors committee. The bankruptcy court overruled the objections and entered the Confirmation Order and Findings and Conclusions on March 9, 1993. Appeals were filed with re-

spect to entry of the Confirmation Order but were subsequently dismissed.

On September 8, 1997, the Trust filed a motion seeking a ruling from the bankruptcy court as to New NGC's liability for unknown asbestos claims in the event the Trust was unable to satisfy those claims. On February 4, 1998, the bankruptcy court determined that the relief sought by the Trust could only be sought by adversary proceeding. The Trust filed an adversary proceeding on February 5, 1998, and the case was tried on February 25, 1998. On February 27, 1998, Judge Felsenthal issued a bench ruling finding that New NGC was liable to unknown asbestos claimants under the terms of the Plan and Confirmation Order. On March 25, 1998, judgment was entered based on the prior bench ruling. New NGC timely appealed.

As a preliminary matter, the court needs to reconsider the Trust's motion to supplement the record filed on June 15, 1998. By order of July 13, 1998, this court denied the Trust's motion to supplement the record. As part of its motion to supplement the record, the Trust seeks to make the objections of the bond and trade creditors committee to the Third Modifications part of the appellate record in the appeal now before the court. Those objections were filed on March 8, 1993, prior to entry of the Confirmation Order, and were part of the record before the bankruptcy court when it entered its Confirmation Order. As such, the objections are properly part of the appellate record in the present appeal be-

fore this court.[1] Thus, appellee's motion to supplement the record is Granted with respect to the objections by the bond and trade creditors committee to the Third Modifications and is Denied with respect to the remaining documents.

DISCUSSION

I. STANDARD OF REVIEW

When a district court reviews a bankruptcy court's decision, it functions as an appellate court and utilizes the same standard of review generally applied by a federal court of appeals. *In re Webb*, 954 F.2d 1102, 1104 (5th Cir. 1992). In reviewing conclusions of law on appeal, a *de novo* standard of review is applied. *In re Coutee*, 984 F.2d 138, 140 (5th Cir. 1993); *In re Young*, 995 F.2d 547, 548 (5th Cir. 1993); *In re Allison*, 960 F.2d 481, 483 (5th Cir. 1992). A bankruptcy court's findings of fact are subject to the clearly erroneous standard of review. *Young*, 995 F.2d at 548; *Allison*, 960 F.2d at 483. These findings are reversed only if, based on the entire evidence, the court is left "with the definite and firm conviction that a mistake has been made." *Id.*

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[1] In the order of July 13, 1998, this court noted that "there is no indication that the Bankruptcy Court considered or even reviewed the proposed documents when reaching its judgment in the underlying adversary proceeding." While that statement is true with respect to the documents pertaining to the appeal of the Confirmation Order, it is not true with respect to the objections to the Third Modifications.

II. JURISDICTION

Appellant maintains that the bankruptcy court had no jurisdiction to hear the declaratory action brought by the Trust because the declaratory action sought to establish successor liability against New NGC, a non-debtor, with respect to post-confirmation personal injury and wrongful death tort claims of other non-debtors, unknown asbestos claimants. Appellant further argues that since the Plan has been confirmed and substantially consummated, the mere fact that New NGC, a non-debtor, is now alleged to have successor liability for the former debtor's torts does not give rise to "related to" jurisdiction. Appellant also challenges the standing of the plaintiffs to bring the declaratory judgment action and asserts that the plaintiffs are not the real party in interest. Appellant argues that the potential unknown asbestos claimants who are not satisfied from the assets of the Trust are the real parties in interest and the parties who have standing to bring this suit.

Judge Felsenthal found that this declaratory judgment action was not a suit to determine the successor liability of New NGC under the laws of thee several states and did not require the court to determine any individual tort claim. (R.A. Tab 30, at 194). Instead, the bankruptcy court found that "this declaratory judgment action calls upon the court to determine whether the plan this court confirmed pursuant to a final order of this court imposed or maintained liability for asbestos disease claims on New NGC." *Id.* On that basis, Judge Felsenthal held that the suit involved the construction of a Chapter 11 plan of reorganization confirmed by an order of the bankruptcy court and was a core matter over which he had jurisdiction.

A bankruptcy court has jurisdiction to declare and determine the scope and effect of an order entered in prior bankruptcy proceedings, and the ability to rule on the legality of plan provisions, releases and injunctions which may be part of the plan. *In re Fairchild Aircraft Corp. v. Campbell*, 184 B.R. 910, 915 (Bankr. W.D. Tex. 1995), *vacated on other grounds*, No. 94-5113, 1998 WL 244272 (Bankr. W.D. Tex. May 13, 1998). As discussed in more detail *infra*, this court agrees that the declaratory judgment action was not a proceeding to establish successor liability of New NGC on the basis of successor liability law. Rather, the declaratory judgment action brought by the Trust sought an interpretation of the confirmation order entered by the bankruptcy court in 1993. Additionally, jurisdiction of the bankruptcy court is provided for in 28 U.S.C. § 1334. The Fifth Circuit has held in determining whether jurisdiction exists, "it is necessary only to determine whether a matter is at least 'related to' the bankruptcy." *Walker v. Cadle Co. (In re Walker)*, 51 F.3d 562, 568-69 (5th Cir. 1995) (internal citations omitted). The *Walker* court further stated that "an action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankruptcy estate. *Id.* at 569. Under this test, this suit is "related to" the bankruptcy. The outcome of this suit will impact the way the Trust handles and administers the bankruptcy estate and could alter the Trust rights, liabilities, options or freedom of action in resolving asbestos related claims against the estate. Thus, the court finds that the bankruptcy court had jurisdiction to hear the declaratory judgment action filed by the Trust.

The court also finds that the plaintiffs have standing to bring this suit and are real parties in interest. The Fifth Circuit holds that the "irreducible minimum of standing contains three elements." *Pelican Chapter, Associated Builders & Contractors, Inc. v. Edwards*, 128 F.3d 910, 915 (5th Cir. 1997). The three elements, which the party asserting standing bears the burden of establishing, are: (1) the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest; (2) there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of some independent action of some third party not before the court; and (3) it must be likely, as opposed to speculative, that the injury will be redressed by a favorable decision. *Id.* at 915-16 (internal citations and quotations omitted).

Under the provisions of the Confirmation Order, known asbestos claims were limited to recovering solely from the Trust and could not seek recovery from Old NGC or New NGC. Under the Third Modification and Confirmation Order, unknown asbestos claimants were initially channeled to the Trust for their remedies. The Order further provided that New NGC would not be subject to the commencement or continuation of litigation by unknown asbestos claims pending exhaustion of the remedies provided by the Trust. (Confirmation Order, para. 9(b)). Due to events transpiring after the Confirmation Order was entered, the Trust recognized that it would not have sufficient assets to satisfy the known and unknown asbestos claims it anticipated would be filed. In order for the Trust to determine how to allocate its limited resources, the Trust filed the present suit to ob-

tain a declaration from the bankruptcy court as to whether the confirmation order barred unknown asbestos claimants from seeking relief against New NGC. Resolution of the issues presented in the declaratory action will provided guidance to the Trust on how to allocate its bankruptcy estate assets among the known and unknown asbestos claimants. While the ultimate beneficiaries of the bankruptcy court's ruling will be asbestos claimants, the Trust has the ongoing responsibility under the confirmation order to administer the bankruptcy estate in attempting to satisfy these claimants. In particular, the Trust's decisions on how to allocate its assets will be impacted by whether unknown asbestos claimants have recourse to new NGC or will be limited to seeking recovery from the Trust. Hence, plaintiffs satisfy the elements of standing and are the real parties in interest in this suit.

III. THE BANKRUPTCY COURT'S DETERMINATION ON LIABILITY

On February 27, 1998, the Bankruptcy Court issued its 1998 Bench Ruling and entered its Judgment on March 25, 1998. The Judgment held that "[p]ursuant to the plan, as modified, and the Confirmation Order, New NGC is liable for an unknown asbestos disease claim, as that term is defined . . ., to the extent that such unknown asbestos disease claim has not been discharged by the [P]lan and [C]onfirmation [O]rder and is not satisfied or otherwise resolved by the Trust and ACMC." (Judgment, at 2). In reaching this result, the Bankruptcy Court stated:

> Unknown asbestos disease claimants could not be discharged. They were channeled to the trust. They were enjoined from commencing

> litigation against New NGC pending exhaustion. Having exhausted their Trust remedies, the unknown asbestos disease claimants could have the injunction lifted and commenced litigation against New NGC, with their claims not discharged. Pursuant to the plan and by definition of the plan, the Trust remedies will have been exhausted pursuant to two enumerated criteria. The trust owns Old NGC. Its assets for all practical purposes would have been exhausted. If the unknown claimants could not proceed against New NGC with New NGC having liability, the unknown claimant would have no meaningful remedy. With all due respect to the learned and considered arguments of counsel, the only reading that gives meaning to these findings of fact and conclusions of law are that this plan as confirmed by this court contemplated New NGC liability for claims not paid by the Trust and not otherwise discharged.

(Appendix to Appellant's Brief, Tab 30, at 200-01, 1998 Bench Ruling). Further, the Bankruptcy Court explained that the Confirmation Order implicitly provided for Appellant's continued liability and that this liability was implicit in the contractual arrangement. *Id.* at 206, 210.

In its appeal, New NGC asserts that the Bankruptcy Court should be reversed for a host of reasons. Of these reasons, however, the most compelling is Appellant's claim that the Bankruptcy Court's interpretation of the Plan, Plan Documents and Confirmation Order was in error because it contradicts the plain language of these Documents. (Appellant's Brief, at 26). Specifically,

New NGC argues that none of these documents "contains any language that purports to impose liability upon New NGC to Unknown Claimants injured by Old NGC's torts and products." *Id.* at 27. Rather, Appellant claims that the language in these documents expressly denies that New NGC would retain liability for Unknown Claims. *See id.* at 27-9. Given the express language found in the Plan, the Plan documents and the Confirmation Order, Appellants conclude that the Bankruptcy Court's interpretation of implicit liability is unsupported by law.

Not surprisingly, Appellees dispute New NGC's conclusion, and maintain that the Bankruptcy Court's interpretation of its Confirmation Order presents the only reasonable and legally appropriate interpretation of the Plan, the Plan Documents and the Confirmation Order. (Brief of Appellees, at 18). In so arguing, Appellees reference the Bankruptcy Court's 1998 Bench Ruling in which the Bankruptcy Court explains that it must read the plan and its implementing document, "coherently, giving meaning to all its provisions and terms, but doing so consistent with the confirmation order, which governs." (Brief of Appellee, at 19) (citing 1998 Bench Ruling, at 195-95). Consequently, Appellees argue that the judgment in the Adversary Proceeding is simply the result of the Bankruptcy Court interpreting its Confirmation Order in a manner consistent with the Plan, the plan documents, and the bankruptcy court's application of bankruptcy law. Appellees further contend that the finding that New NGC maintained its liability for Unknown Claims was necessary to give effect to the Bankruptcy Court's earlier refusal to approve a plan that would discharge or permanently enjoin unknown asbestos disease

claimants. (Brief of Appellee, at 19). Similarly, Appellees argue that the Bankruptcy Court's implementation of the Channeling Injunction presumes continued liability of New NGC for Unknown Claims. *Id.* at 20. In addition, Appellees claim that "[t]he 1993 Bench Ruling is replete with evidence of the Court's determination that New NGC—a creature of the reorganization—would always remain liable for the Unknown AD claims." *Id.* Therefore, in light of its previous determinations and statements in its 1993 Bench Ruling, Appellees conclude that the Bankruptcy Court's judgment is a proper interpretation of the Plan, Plan Documents and Confirmation Order.

Initially, the Court notes that the issues raised in the Adversary Proceeding required the Bankruptcy Court to interpret the Confirmation Order it issued in 1993. In general, when an appellate court reviews a lower court's interpretation of its own order, that interpretation is afforded great deference. *Harrison v. Metropolitan Gov't of Nashville & Davidson County*, 80 F.3d 1107, 1119 (6th Cir. 1996); *see also Schwinn Cycling & Fitness Inc. v. Benonis*, 217 B.R. 790, 795 (Bank. N.D. Ill. 1997) ("the court's reading of its own order . . . is entitled to respect.") (*quoting Matter of Xonics, Inc.*, 813 F.2d 127, 130 (7th Cir. 1987)).

In interpreting a plan of reorganization, a court applies the rules of contract interpretation. *Matter of Texas Green Petroleum Corp.*, 52 F.3d 1330, 1335 (5th Cir. 1995). "A question of contract interpretation, including the determination of whether a contract is ambiguous in order to permit extrinsic evidence of intent, is a question of law." *In re Stratford of Texas, Inc.*, 635 F.2d at 368. Generally, a court should determine a con-

tract's meaning without considering extrinsic evidence in accordance with the principle that the language of the agreement, unless ambiguous, represents the parties' intentions. *Id.* (*citing Eaton v. Courtauds of North America, Inc.*, 578 F.2d 87, 90 (5th Cir. 1978). However, if ambiguity exists, the court may accept extrinsic or parole evidence to establish the parties' true intentions; however, determining the parties' intent from extrinsic evidence is a question of fact. *In re Stratford of Texas, Inc.*, 635 F.2d at 368.

In its brief, Appellant argues that the Plan, Plan Documents and Confirmation Order unambiguously indicate that it was not the intent of the parties to impose any liability upon NNG for any Asbestos Claims. (Appellant's Brief, at 27). Specifically, Appellants claim that the Asset Purchase Agreement, the Plan, and the Confirmation Order unambiguously indicate that no imposition of liability was intended. *Id.* at 27-8. Appellees agree that the Confirmation Order and its implementing documentation are unambiguous, but urge a different construction of the documents.

With respect to the Asset Purchase Agreement, Appellant claims that successor liability is specifically rejected in sections 1.1, 2.1(b) and 2.4. Section 1.1 states that "Seller shall convey to Buyer the Acquired Assets . . . free and clear of all Liens, Claims, Interests, and other liabilities, duties, obligations . . . ." (Appendix to Appellant's Brief, Asset Purchase Agreement, at 3). Section 2.1(b) explains that the Buyer agrees to assume all liabilities arising on or before the closing date or related to the business of the Seller conducted on or before the closing date including "al obligations to fund the Asbestos Fund Expenses Commitment." *Id.* at 7. Sec-

tion 2.4 states that notwithstanding those expressed in section 2.1, "Buyer does not hereby assume, and shall not be deemed to have assumed, any liabilities of Seller of any kind or nature, known, unknown, contingent, or otherwise, by reason of any theory of law or equity." *Id.* at 13. With respect to the Plan, Appellant points to section 5.2(d) which states that "the obligations regarding the Asbestos Claims . . . shall be the sole responsibility of the [Trust]." Appellant argues that "[i]f the obligation for Asbestos Claims under the Plan belonged to New NGC as well as the Trust, the Agreement would not have excluded the assumption of such liabilities and the Plan would not have provided that they were solely the Trust's responsibility." (Appellant's Brief, at 27). In addition, Appellant argues that the Confirmation Order provided that the sale of assets to New NGC was "free and clear of all Liens, Claims, Interests and other liabilities . . . to the maximum extend [sic] permitted by the Bankruptcy Code . . . ." (Appellant's Brief, at 28) (citing Confirmation Order, at § 6(a)). Given the language of these documents, Appellant concludes that the agreement unambiguously rejects any imposition of liability on New NGC for asbestos claims. The Court does not agree.

First, the Bankruptcy Court explicitly stated in its Confirmation Order that "New NGC shall not be subject to the commencement or continuation of litigation by any person on or on account of Unknown Asbestos Disease claims pending exhaustion of the remedy or remedies provided by the NGC Asbestos Settlement Fund." (Confirmation Order, at ¶ 9) (emphasis added). The clear implication of this statement is that once the Settlement Fund is exhausted, Unknown Claimants may

commence litigation against NNG. Appellants would read this statement as standing for the proposition that once the fund is exhausted an Unknown Claimant can sue, but will have to overcome an additional hurdle of proving successor liability under the applicable state law. The Court can find nothing in the Plan, Plan Documents or Consolidation Order (the "Agreement Documents") which contemplates this reading. Further, the Confirmation Order barred punitive damages by unknown asbestos claimants against New NGC. (Confirmation Order, at ¶ 9(c)). This indicates that the Order contemplated that New NGC would be liable for other types of damages.

With respect to the Assets Purchase Agreement, Article 2.2(iii) provides that new NGC is to assume any obligations and liabilities pursuant to any Final Order of the Bankruptcy Court. The bankruptcy court interpreted its Confirmation Order as leaving New NGC liable for unknown asbestos claims to the same extent that Old NGC was liable. When viewed in isolation, certain provisions of the Confirmation Order, the Plan and the Assets Purchase Agreement arguably support the appellant's arguments that New NGC emerged from the bankruptcy proceedings without any liability for unknown asbestos claims. However, as the bankruptcy court explained, "the plan and its implementing documents must be read coherently, giving meaning to all its provisions and terms, but doing so consistent with the confirmation order, which governs. The plan and its implementing documents cannot be read to render any provision of the

confirmation order meaningless or superfluous."[2] (1998 Bench Ruling, at 194-95). When considered in light of the bankruptcy court's findings in January 1993, the intent of Confirmation Order is clear. In response to the proposed joint plan of reorganization, the bankruptcy court determined in January 1993, that as a matter of bankruptcy law, the unknown asbestos claims could not be discharged or enjoined. However, to offer some protection from potential litigation involving unknown asbestos claims to New NGC as an ongoing business emerging from bankruptcy proceedings, the bankruptcy court entered the channeling order. The Confirmation Order expressly provided that the unknown asbestos claims would be channeled to the Trust as long as the Trust had sufficient assets to satisfy those claims. It is, as Judge Felsenthal found, implicit in the Confirmation Order that if the Trust had insufficient assets to satisfy the unknown claims, those claimants could look to New NGC. Thus, the issue was not, and is not, one of successor liability as appellant insists. Rather, the issue is one of application of bankruptcy law and of interpretation of the Confirmation Order. The application of bankruptcy law occurred in 1993 when Judge Felsenthal

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[2] It also appears likely that since the plan of reorganization initially provided that New NGC would not be liable for unknown asbestos claims, the Assets Purchase Agreement and the Plan contained provisions that gave effect to this intent. After the Third Modifications were presented and ruled on, it appears that some of the language in the implementing documents purporting to absolve New NGC from liability for unknown asbestos claims was not removed. In any event, when considering the Confirmation Order in light of the implementing documents and the surrounding circumstances, the court finds the Confirmation Order is unambiguous.

determined that unknown asbestos claims against New NGC were not "claims" within the meaning of the Bankruptcy Code and thus could not be discharged or enjoined. That determination was not appealed and is now a binding, final order. The issue before the bankruptcy court in the case now before the court was the interpretation of the Confirmation Order, specifically, whether New NGC retained liability for unknown asbestos claims under the terms of the Confirmation Order. In the present suit, the bankruptcy court found that it determined in 1993 that unknown asbestos claims against New NGC could not be discharged and could not be enjoined, and that New NGC was liable for those claims to the same extent as Old NGC, the debtor. Thus, the Confirmation Order implicitly established that New NGC was liable to unknown asbestos claimants as a matter of bankruptcy law. As noted above, that determination by the bankruptcy court was not appealed. As the bankruptcy court found, if New NGC was not to have any liability for unknown asbestos claims, the channeling order would have been unnecessary. Further, if upon the lifting of the channeling order, the unknown asbestos claimants had no recourse to New NGC, those claims would, in effect, have been discharged by the Confirmation Order. Judge Felsenthal also explained that the transfer of assets from the debtors to New NGC was not an "isolated transfer" nor a third party transaction. New NGC was created by the Plan and acquired its assets pursuant to the Plan. New NGC, therefore, does not stand in the shoes of third party purchaser who acquired the assets in an arms length transaction. Thus, the issue before the bankruptcy court was not the issue of successor liability but of interpretation of the Confirmation Order.

Appellant insists that the bankruptcy court's order now before this court amounts to an adjudication of the unknown claimants' tort claims against New NGC and thus exceeded the jurisdictional limitations of the bankruptcy court. As noted above, this argument misconstrues the issue before the bankruptcy court. The issue was the whether New NGC retained liability to unknown asbestos claimants under the terms of the Confirmation Order. In its bench ruling in 1998, the bankruptcy court specifically noted that the suit before it did not call upon the court to determine any individual tort claim. The arguments now made by appellant with respect to the impropriety of the bankruptcy court's determination that New NGC could not be discharged from liability to unknown asbestos claimants should have been made in 1993.[3] The court finds that the bankruptcy court correctly interpreted its Confirmation Order, and the judgment of the bankruptcy court is affirmed.

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[3] In this connection, the court notes that in their objections to the Third Modifications, the bond and trade creditors committee noted that "[u]nder the Third Modification, contrary to the NGC Plan as solicited, asbestos creditors may be able to pursue the assets of New NGC in the future." The bankruptcy court overruled the objections, and the subsequently entered Confirmation Order was not appealed. In light of these objections to the Third Modifications, appellant's arguments that the bankruptcy court's interpretation of the Confirmation Order denied creditors full and fair disclosure of New NGC's continued liability for unknown asbestos claims and that creditors and third parties expected that New NGC would not be liable for those claims are without merit.

IV. RULING ON THE MOTION TO RECUSE/DISQUALIFY

The Confirmation Order required the Trust to submit, under seal, semi-annual reports to the bankruptcy court containing information pertaining to the number of claims filed and resolved, the assets remaining in the Trust, the status of the participation of Old NGC and the Trust in the Center for Claims Resolution, and "such information as the Court may, from time to time, require." (R.A. Tab 36, at para. 9(e)). In the course of filing these reports, the Trust informed the bankruptcy court that New NGC's liability to unknown asbestos claimants would need to be resolved. The report further stated that if unknown claimants have only the Trust as their remedy, New NGC would, in effect, have the permanent injunction that New NGC "did not get at confirmation. . ." Appellant urges that 28 U.S.C. § 455(a) and Bankruptcy Rule 5004(a) required Judge Felsenthal to recuse himself after receiving these inappropriate and prejudicial ex parte communications from the Trust. By order of December 4, 1997, Judge Felsenthal denied appellant's motion for recusal. Assuming, as did the bankruptcy court, that the Trust's reports constituted improper ex parte communications, the court finds that the bankruptcy court did not commit error in denying the motion for recusal.

The decision to recuse is committed to the discretion of the trial court and is reviewed for abuse of discretion. *In re Chevron U.S.A., Inc.*, 121 F.3d 163, 165 (5th Cir. 1997). The purpose of section 455(a) is to protect against even the appearance of impropriety. The standard used to determine if recusal is appropriate is "whether a reasonable an objective person, knowing all

of the facts, would harbor doubts concerning the judge's impartiality." *Id.* In light of the extensive and ongoing litigation which has resulted from this bankruptcy filing and the myriad of issues which were before the bankruptcy court, the court finds that a reasonable and objective person, knowing all of the facts, would not have doubts concerning the judge's impartiality. The information of which appellants complain was not secret information which appellants did not have the opportunity to address. Indeed, the information placed in the reports by the Trust ultimately became the Trust's position in its declaratory judgment action, was squarely before the judge in deciding the case, and was responded to by appellants. Further, there is no evidence that the ex parte communications influenced the judge, or that the judge relied on the information in deciding the case before him. *Trust Company of Louisiana v. N.N.P., Inc.*, 104 F.3d 1478, 1491 (5th Cir. 1997). The judgment of the bankruptcy court on the motion to disqualify is affirmed.

So Ordered.

Signed this 28th day of May 1999.

/s/

Jorge A. Solis
United States District Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
NATIONAL GYPSUM COMPANY, AANCOR HOLDINGS, INC.,	§	CASE NO. 390-37213-SAF-11
	§	CASE NO. 390-37214-SAF-11
DEBTORS.	§	(Jointly Administered)
NGC SETTLEMENT TRUST and THE ASBESTOS CLAIMS MANAGEMENT CORPORATION,	§	
PLAINTIFFS,	§	ADVERSARY NO. 398-3309
VS.	§	
NATIONAL GYPSUM COMPANY,	§	
DEFENDANT.	§	

JUDGMENT

[Entered March 25, 1998]

This adversary proceeding came on for trial on February 25, 1998, on the complaint of the NGC Settlement Trust and the Asbestos Claims Management Corporation for declaratory judgment that the first amended and restated joint plan of reorganization of National Gypsum Company and Aancor Holdings, Inc., as amended, the

order of this court confirming the plan and plan implementing documents, including but not limited to the assets purchase agreement, impose liability on the defendant for unknown asbestos disease claims. The court having considered the evidence admitted at the hearing, the arguments of counsel, and the record of this proceeding and the confirmation hearing in the underlying bankruptcy case, and the court having rendered a decision on the construction of the plan, confirmation order and plan documents in the bench ruling announced February 27, 1998, which constitutes its findings of fact and conclusions of law;

IT IS THEREFORE ORDERED that pursuant to the plan as modified, and the confirmation order, New NGC is liable for an unknown asbestos disease claim as that term is defined in section 1.17 of the third technical modifications of the plan to the extent that such unknown asbestos disease claim has not been discharged by the plan and confirmation order and is not satisfied or otherwise resolved by the Trust and ACMC. This declaratory order does not alter, suspend or otherwise modify any provisions of the plan or confirmation order. This declaratory judgment does not relieve any individual unknown asbestos disease claimant of any element of his burden of proof in any individual tort litigation.

Signed this 23rd day of March, 1998.

/s/

Steven A. Felsenthal
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	)	BK. NO: 390-37213-SAF-11
NATIONAL GYPSUM COMPANY, a Delaware corporation,	)	
DEBTOR.	)	
IN RE:	)	BK. NO: 390-37214-SAF-11
AANCOR HOLDINGS, INC., a Delaware corporation,	)	
DEBTOR.	)	JOINTLY ADMINISTERED

NGC SETTLEMENT TRUST and THE ASBESTOS CLAIMS MANAGEMENT CORPORATION,	)	
Plaintiffs,	)	
vs.	)	ADV. NO.: 397-3319
CURRENT NGC ASBESTOS DISEASE CLAIMANTS, UNKNOWN NGC ASBESTOS DISEASE CLAIMANTS, DANIEL M. PHILLIPS, the Legal Representative of the Un-	)	

Representative of the Unknown Claimants, and	)
THE ASBESTOS DISEASE CLAIM TRUSTEES' ADVISORY COMMITTEE,	)
Defendants.	)

TRANSCRIPT OF PROCEEDINGS

[Bench Ruling of February 27, 1998]

* * *

The first is adversary proceeding 398-3309, which I refer to as the Trust declaratory judgment action regarding liability of New NGC. I'm doing this somewhat abbreviated, but the parties know what the issues are and I don't believe I need to spell out all of them. In this adversary proceeding, the NGC Settlement Trust seeks a declaration that, pursuant to the National Gypsum Company plan of reorganization as confirmed by order of this court pursuant to the United States Bankruptcy Code, New NGC is liable for non-Bankruptcy Code asbestos disease claims not resolved by the Trust. Again, this is shorthand. It's implicit that there is to otherwise be tort liability that would have been found against National Gypsum Company.

The Trust contends that the plan, as confirmed by the court, imposes liability on New NGC. New NGC contends that pursuant to the asset purchase agreement, New NGC did not expressly assume liability for unsatisfied non-Bankruptcy Code asbestos disease claims, but rather the plan provided that liability of New NGC, if

any, would be determined on a case-by-case basis upon the lifting of the channeling order.

The construction of a Chapter 11 plan of reorganization as confirmed by an order of the United States Bankruptcy Court is a core matter over which this court has jurisdiction to enter a final order with judgment. I believe Judge Solis summoned the motion to withdraw reference when this item came up as a contested matter has now entered a finding to that effect. In the order confirming the National Gypsum plan, this court specifically retained its jurisdiction. This declaratory judgment action is ripe for adjudication because of the impact of the liability determination to the motion of the Trust to terminate participation of ACMC in the Center, which is currently under advisement with this court and which I intend to address later this morning.

This declaratory judgment does not call upon this court to determine and apply a successor liability laws of any of the several states. Nor does this declaratory judgment action call upon the court to determine any individual tort claim. Rather, this declaratory judgment action calls upon the court to determine whether the plan this court confirmed pursuant to a final order of this court imposed or maintained liability for asbestos disease claims on New NGC.

Justice Scalia writing for a unanimous Supreme Court in *Timbers* litigation instructed that the reading of the Bankruptcy Code was a holistic endeavor. The Bankruptcy Code must be read as a whole giving meaning to all its terms and provisions, rendering none meaningless or superfluous, but rather assuring that the Code be coherent and consistent. That same rule of construction applies to a plan of reorganization confirmed by a

court pursuant to a court order and implemented through plan documents approved by the court, but subject to the confirmation order. The plan as implemented through the plan documents, must be read as a whole consistent with the confirmation order. The plan and its implementing documents must be read coherently, giving meaning to all its provisions and terms, but doing so consistent with the confirmation order, which governs. the plan and its implementing documents cannot be read to render any provision of the confirmation order meaningless or superfluous. In the event of a conflict between the plan documents and the plan, the plan governs. In the event of a conflict between the plan and the confirmation order, the order governs.

Applying these fundamental rules of contractual construction, the plan as confirmed by order of this court implicitly imposes or maintains liability on New NGC for asbestos disease non-Bankruptcy Code claims not discharged by the confirmation order and not satisfied by the Trust. That is the only reading that gives meaning to the court's order that the non-Bankruptcy Code asbestos disease claims could not be and were not discharged; that the claims could not be permanently enjoined from commencing tort litigation against New NGC and that the channeling order with a temporary injunction suits against New NGC could be lifted by order of this court upon the satisfaction of the enumerated criteria. If the plan did not impose or maintain liability on New NGC, then the court's decision that the subject claimants could not be permanently enjoined becomes a meaningless court order, as does the court's order that those claims could not be discharged.

At the time of the filing of the bankruptcy petition, National Gypsum Company no longer manufactured, distributed, applied or marketed asbestos containing products. Rather, New National Gypsum Company was an operating entity in the gypsum wallboard business, which also owns several other operations. Upon confirmation of the plan, New NGC was created by the plan to be the operating business entity of the gypsum wallboard business.

In this court's bench ruling on January 29, 1993, the court explained that asbestos disease claims sound in tort. For a claim under the Bankruptcy Code, the holder of a claim had to have a right to payment recognized under non-bankruptcy law. Thus, for a right to payment based on a tort, a person must have suffered an injury that would result in a damages judgment in the applicable jurisdiction. A breach of duty that did not cause or result in an injury compensable in damages would not create a right to payment. What constitutes an injury cognizable in damages varies by jurisdiction. The court went on to explain that persons exposed to asbestos from National Gypsum Company's asbestos-containing products who have suffered an injury recognized and compensable in the appropriate non-bankruptcy jurisdiction have a claim under the Bankruptcy Code, whether reduced to judgment, unliquidated or disputed. The court may impose a permanent injunction against those persons pursuant to Section 524 and 1141 of the Bankruptcy Code. Persons exposed to asbestos from National Gypsum Company's asbestos-containing products who have not suffered an injury recognized and compensable in the appropriate non-bankruptcy jurisdiction, do not have a claim under the Bankruptcy Code. As to them,

the court could no impose a permanent injunction under either Sections 524 or 1141.

The court's findings of facts and conclusions of law entered March 9, 1993 adopted the plan's definition to implement the bench rulings. Code claimants were defined as current asbestos disease claims. Non-Bankruptcy Code claimants were defined as unknown asbestos disease claims. Without restating the entire explanation of the court's reasoning as contained in the bench ruling, the court found under non-bankruptcy law that the plan could establish a trust for asbestos disease claimants, be they current or unknown. All could be the beneficiaries of the trust. Under the Bankruptcy Code, the current claimants would be discharged and the operating business entity would be shielded from liability by them by a permanent injunction. Under the Bankruptcy Code, the unknown asbestos disease claimants would not be discharged. If not satisfied by the Trust, the unknown claimants would have recourse to the operating business entity.

The court channeled the unknown asbestos disease claimants to the Trust. Channel means to route from one place to another. The unknown asbestos disease claimants were routed from the operating business entity to the Trust where they would remain unless or until the Trust could not satisfy their claims. Should that eventuality occur, the unknown asbestos disease claimant could move to lift the channeling order, thereby permitting them to proceed against the operating entity. That entire scenario only had meaning if the operating entity has liability, the operating entity as established by the plan in New NGC.

Focusing on asbestos claims. The court's findings of facts and conclusions of law at number 39 found that the plan and confirmation order provided an equitable means to compensate asbestos claimants with injunctions and a channeling order essential to the viability of the business operation of New NGC and to the successful implementation of the plan, including assuring asbestos-related litigation protection for New NGC to provide it with an enterprise value of $350 million on the effective date of the plan. The court had found that with such protection, New NGC would have a $350 million effective date value. That being the value of property used to satisfy over $1 billion in trade and bondholder debt. Paragraph 39 also found that following the court's bench ruling, which I just summarized, the debtor modified the plan to incorporate the definitions consistent with the court's bench findings and modified the injunction and channeling order to comply with the court's ruling. The court found and concluded that without the protections of the injunction and channeling order for New NGC, National Gypsum Company could not consummate its plan.

At paragraph 41, the court found that there were approximately 62,000 holder of asbestos disease claims recognized as claims under the Bankruptcy Code subject to a discharge and permanent injunction. The court found they would be paid by what is now referred to as the Trust. The court also estimated 150,000 to 165,000 unknown asbestos disease claims who could not be discharged, but who were channeled from the operating entity to the from the operating entity to the Trust, being made beneficiaries of the Trust. The court estimated that those claims had an indemnity value of between

$695 million and $765 million. The court found that asbestos claimants should be fairly and similarly treated under the plan, pursuant to the implementing orders of the court.

To implement the plan, the court identified at number 42 certain plan documents, which the court will discuss in a moment.

In its conclusions of law at paragraph 8, the court concluded it could discharge property damage and current asbestos disease claims and permanently enjoin suit by those claimants against New NGC and others. For unknown asbestos disease claimants, the court again concluded that it could not grant a discharge or issue a permanent injunction. The third motion to modify the plan deleted any permanent injunction or discharge for unknown asbestos disease claimants from the plan. The court again concluded it could channel those people to the Trust, making them beneficiaries. The channeling order protected the $350 million effective date value for New NGC necessary to place New NGC in the market with the value necessary to deliver plan benefits to the trade and bond creditors. With the channeling order, the court concluded it could enjoin unknown asbestos disease claimants from commencing litigation against New NGC pending exhaustion of their Trust remedy.

Let's take a pause at this point and reflect on these series of findings giving the language used its plain meaning. Unknown asbestos disease claimants could not be discharged. They were channeled to the Trust. They were enjoined from commencing litigation against New NGC pending exhaustion. Having exhausted their Trust remedies, the unknown asbestos disease claimants could have the injunction lifted and commence litigation

against New NGC, with their claims not discharged. Pursuant to the plan and by definition of the plan, the Trust remedies will have been exhausted pursuant to two enumerated criteria. The Trust owns Old NGC. Its assets for all practical purposes would have been exhausted, if the channeling order is to lift at least to the level necessary to satisfy a particular claim. If the unknown claimant could not proceed against a New NGC with New NGC having liability, the unknown claimant would have no meaningful remedy. With all due respect to the learned and considered arguments of counsel, the only reading that gives meaning to these findings of fact and conclusions of law are that this plan as confirmed by this court contemplated new NGC liability for claims not paid by the Trust and not otherwise discharged.

Paragraph 9 concludes that the plan and confirmation order are binding on New NGC and others. Paragraph 10 concludes that the court could retain jurisdiction as provided by the plan and confirmation order. Paragraph 12 incorporates the bench rulings.

Thereupon, the court entered its confirmation order on March 9, 1993. The court confirmed the plan with the three modifications approved by the court. That was paragraph number one. But the court specifically provided that in the event of a conflict between the terms of the plan and the confirmation order, the order controls. Thus, the order is an integral part of the construction of the plan. The plan with its implementing documents must be read consistently and coherently with the order and with the order controlling. At paragraph 4 the court approved the implementing documents, but, quote, "consistent with the plan," closed quote.

* * *

Continuing. At paragraph 8 the court discharged current asbestos disease claimants. At paragraph 9, the court ordered that property damage and current asbestos disease claimants be satisfied solely from the Trust with New NGC having no responsibility. But the court did not provide the same expressed provision for New NGC for unknown asbestos disease claims. Rather, the Trust was directed to resolve those claims to the extent feasible. The order does not state that New NGC has no responsibility, as the order did for current and property damage claims. Rather, the order states that New NGC shall not be subject to litigation pending exhaustion of the Trust remedies. That only has meaning if New NGC has liability should the remedies be exhausted without resolving the non-discharged claims. Otherwise, there's no effective difference in treatment and the entire ruling concerning asbestos disease claims becomes meaningless and superfluous. The court went on, however, to bar punitive damages against New NGC, contemplating thereby liability for compensatory damages for non-discharge claims.

At paragraph 9(f), the court provided a mechanism for the appeal of its Bankruptcy Code claim discharge ruling regarding persons exposed to asbestos. The court had recognized the split in authority on its ruling. Some courts have read the definitional section of claims in the Bankruptcy Code to expand non-bankruptcy law meaning of rights to payment, considering the several adjectives used in the definition to be federal standards expanding non-bankruptcy law. This court rejected that reading finding, instead, that the definitions were to be given the non-bankruptcy law meaning. Thus, for example, the word contingent, as a contingent right to

payment, had to be read as a non-bankruptcy contractual law would consider a contingent claim. The same with unliquidated claims. The court rejected the notion of an unmatured tort, as opposed to an unliquidated tort. But the court recognized the split of authority and provided a means to appeal that determination. Should an Appellate Court have reversed, then a permanent injunction would have been imposed on unknown asbestos disease claimants and we wouldn't be here on this motion today. That did not happen. The only reading that makes this ruling not superfluous is to thereby recognize that the plan as confirmed by this court imposed or maintained the liability of New NGC, as the operating entity emerging from the bankruptcy proceeding.

But the court then proceeded to enter a series of provisions that would shield New NGC from litigation. Indeed, the protections were structured in such a manner that New NGC would enjoy that protection well beyond the then foreseeable future. New NGC and its owners, emerging from bankruptcy, namely the trade and bond creditors, would enjoy marketplace activities with a substantial degree of asbestos litigation protection. The court had found that even though the protection was not permanent and final, the extent of liability exposure would have a negligible impact on New NGC's marketplace effective date value. In nearly five years, the court has not received evidence that it was incorrect in that assessment. And so, the unknown asbestos disease claims were channeled to the Trust. The Trust was authorized to continue participating in the Center for Claims Resolution. If the Trust had to go to an alternative facility, the court outlined the facility provisions to

thereby have an alternative method to resolve claims with a continuing shield to New NGC from suit.

At paragraph 10, the court entered its orders on the injunction and channeling. The injunction and discharge applied only to holders of Bankruptcy Code claims. The unknown asbestos disease claimants, who were found not to be Bankruptcy Code claimants, were channeled to the Trust and enjoined from commencing litigation against New NGC, and, for that matter, others ending exhaustion of their Trust remedies. The court defined exhaustion for the benefit of the claimants and others, including New NGC. And the court provided that upon lifting the channeling order, claimants would not be precluded from pursuing rights, if any, under applicable non-bankruptcy law against persons liable to them. But the provision also held that no person was admitting liability. The court also provided that the channeling order with its temporary injunction did not apply to impair the unknown asbestos disease claimants from commencing their rights, including litigation against the Trust and Old NGC, but directed instead that they indeed be channeled to the Trust for that litigation, but subject to the channel lifting provisions. Thus, in the first instance unknown asbestos disease claimants had to commence their litigation and the reorganized NGC. If that process had been exhausted without satisfaction of the claim, the channeling order could be lifted. New NGC would then face litigation, but as to any individual claimant, the claimant would have to prove its tort elements as defined by applicable non-bankruptcy jurisdiction. And New NGC could assert defenses that are appropriate to their particular litigation. The confirmation order implicitly provided for New NGC liability, the confirma-

tion order recognized, however, that New NGC could not be deemed to have admitted liability for any particular claim. The order contemplated tort litigation on a case-by-case basis.

The court should highlight another provision. The court tolled the statute of limitations for unknown asbestos disease claimants to permit the Trust process to be implemented and exhausted. That would have been a meaningless and superfluous order if New NGC had no liability.

At paragraph 29, the court retained the full measure of its Congressionally-established jurisdiction, including enforcing and interpreting the plan and its orders.

The court then appointed the trustees. The court named the trustee the board of director of the reorganized NGC. NGC thereby retained its corporate existence and held certain assets. The Trust became the shareholder of reorganized NGC. New NGC was created to be the operating business entity. The court named its board of directors and officers.

Through three modifications, the plan had been conformed to the court's findings of facts and conclusions of law, with the confirmation order providing that the order governed. The plan was implemented through certain plan documents. Let's examine those, but only to the extent relevant to this particular declaratory judgment action.

The plan at Article 5.1 provided for the Trust and asbestos settlement fund and facilities.

* * *

Under 5.1(d) as modified, the Trust was to extinguish asbestos claims, but, quote, "pursuant to the confirmation order," closed quote. A resolved claim would be resolved as to all entities covered by the plan, including New NGC. But an unresolved, unknown asbestos disease claim would remain subject to the provisions of the confirmation order.

5.3 provided for New NGC. The plan created New NGC at 5.3(a). It was formed as a Delaware corporation. Its purpose was to acquire and continue the business activities and operations of NGC's Gold Bond division, wish was the operation business of the debtor, and other lawful business activities. The court recognizes the debtor had other businesses, such as the ownership of the Austin company, but its operating business at the time was the Gold Bond issue. 5.3(c) made the transfer to New NGC free and clear of claims. But the term claim in the plan was not given a definition, other than that in the Bankruptcy Code. Free and clear of claims is a Section 363 concept. Unknown asbestos disease claimants are not holders of Bankruptcy Code claims. 5.3(d), New NGC did expressly assume certain current obligations of the debtor. That expressed assumption was necessary to enable New NGC to emerge as an operating entity with trade.

* * *

Under 5.2(d), New NGC was directed to perform all the obligations of the debtor, except for asbestos claims, which became the sole responsibility of the Trust. 5.2(d) and 5.3(d) established that New NGC expressly assumed current obligations, which was necessary for its emergence as an operating entity with trade. But the Trust had the sole responsibility under the plan to handle

the asbestos claims. 4.3(e) directed that the asbestos claims be liquidated and resolved through the Trust and its claims facility. But, then the plan in its provisions for the handling of asbestos claims, as confirmed by the court, implicitly imposed liability on New NGC for non-discharged unknown asbestos claimants only and only then if not otherwise resolved by the Trust process. The Trust and the facility provisions are then subject to the confirmation order, including the injunction and channeling provisions and the court's rulings on the claims, which are made a part of the plan by the order that governs and the modifications to the plan. The process thus referenced through 5.3(d) and 4.3(e) and 5.1 includes the order that if the unknown asbestos disease claims are not resolved by the Trust and the channeling order lifts, the unknown asbestos disease claimants may commence tort litigation against New NGC. That's the process. It only has meaning if New NGC has liability. That liability is implicit in this contractual arrangement. Thus, when viewed as a whole and not in an isolated process, New NGC has liability. Otherwise, the order would be meaningless and the order's direction that it govern, superfluous. All these specific subsections must be read as a whole to make the whole consistent and coherent.

As part of the plan implementation, the parties entered an asset purchase agreement. New NGC announced that it was acquiring and Old NGC was conveying the assets, quote, "pursuant to the plan," closed quote. This was not an isolated transfer. This was not a third-party transaction. New NGC was expressly created by the plan. [I]t acquired its asset and its business pursuant to the plan. Every provision of the asset purchase agreement must be read in conjunction with the plan. And by order of this court binding on

plan. And by order of this court binding on New NGC, the plan must be read consistent with the confirmation order. Under Article 2, New NGC expressly assumed certain obligations, as the plan required it to do. Under 2.1(b), New NGC did not assume Old NGC's liability and obligations, quote, "relates to asbestos claims," closed quote, using that as a defined term. Plan at 1.17 defines asbestos claims broadly to include property damage and asbestos disease claims subject to a discharge and covered within the meaning of the Bankruptcy Code and those outside that meaning and not subject to a discharge. This provision thus implements the plan, as confirmed by the court. Had New NGC simply assumed those obligations as a direct responsibility as it did certain other obligations, there would have been no need for the elaborate structure for handling asbestos matters. Indeed, recall that the debtor represented to the court that its bankruptcy filing was driven by bondholder obligations, not by asbestos litigation. Yet, the trade and bondholders claims would be satisfied by their interest in New NGC. To deliver the value on the effective date found by the court, New NGC had to enjoy the maximum amount of protection from asbestos litigation afforded by the law. The channeling order facilitated that. The broad definition permitted the plan drafters to provide in defined terms for the Trust beneficiaries and permitted the asset purchase agreement to shield New NGC by the terms of the plan. The agreement, as I've discussed above, is subject to the plan. The defined term sends the reader to the plan. The plan sets out the structure for asbestos claims resolution and includes the injunction and channeling order provisions, thus the modification. At 5.8 New NGC recognizes that it must perform pursuant to the plan. The agreement at 8.6, rec-

ognizes it is part of a plan and must be read accordingly. 8.10 says the plan controls. The plan is subject to the confirmation order. The confirmation order imposes liability.

The asset purchase agreement purports to transfer free and clear of claims as a defined term. That is consistent with the plan, which limited the concept to the provisions of the Code.

I'll also mention, parenthetically, but it will address what's incorporated into this hearing, the motion to dismiss on jurisdictional grounds is that the asset purchase agreement expressly recognizes that this court has jurisdiction to interpret the agreement.

The record of this adversary proceeding contains certain transcripts of the proceedings before this court. One, a status conference, parties discussed the matter of an expressed assumption of unknown asbestos disease claims liability by New NGC. The court actually questioned why the parties would want to include such a provision. The discharge and channeling orders covered the topic. New NGC had to emerge in the marketplace with the most asbestos litigation protection afforded by law. The asset purchase agreement was subject to the plan and the plan was subject to the confirmation order. The parties, including the Asbestos Committee and the legal representative and the company, were satisfied with the resolution of the matter by the confirmation order. With that resolution, New NGC would face litigation and its liability only if the Trust could not satisfy a claim. As the court intimated in its bench ruling, that day might never come. And it still might never come. The court expressly discussed with the parties at another hearing that the plan structure and the channeling order

afforded New NGC with an opportunity to continually fund the Trust as needed. New NGC may never face tort litigation. There was no need given that confirmation order for an express assumption in the asset purchase agreement. And there still isn't.

Which leads the court back to its order. The confirmation order under 10(b)(2), the injunction for unknown asbestos disease claimants does not preclude the claimant from pursuing his rights, if any, under applicable non-bankruptcy law against any person who may be liable after exhausting the Trust remedies. The court did not preclude New NGC from raising any appropriate defense in that litigation. The court provided that non-bankruptcy law would ultimately dictate the resolution of any particular claim in any particular tort litigation. [T]he Bankruptcy Code itself recognized limited court jurisdiction for Bankruptcy Court personal injury tort claims resolution. This provision recognizes that non-Bankruptcy Code personal injury tort claims, if not resolved, must be adjudicated by non-Bankruptcy Court pursuant to non-bankruptcy law. But that does not mean that New NGC, the creation of a plan of reorganization as confirmed by the court, is not subject to the liability implicitly established by that plan as confirmed by this court. It merely means that the non-Bankruptcy Court must consider this plan and court order as part of that individual litigation.

Justice Scalia's notion of a holistic approach is essential. This case did not only involve asbestos disease claims. It involved asbestos property damage claims with proofs of claims filed, I believe, in excess of $1 billion. It involved bond claims filed in excess of $1 billion. It involved trade claims. It involved substantial

environmental claims throughout the United States. It involved international transactions. It involved a major player in the United States construction industry. And it involved the preservation of thousands of jobs. The plan as confirmed by the court balanced all those interests. By implicitly addressing this asbestos liability, rather than explicitly doing so, and by deferring the matter as provided in the plan, the court enabled New NGC to emerge in the marketplace post-confirmation as an effective entity, posed, under the right market conditions to prosper, and thereby benefit all the constituencies.

The issue may never have arisen. Just like the channeling order may never lift. But, unfortunately, some circumstances have changed. The Trust filed its motion to terminate its participation in the Center. The hearing on that motion involved evidence that suggests that unknown asbestos disease claims may be greater than anticipated by the court at confirmation. And may be greater by 100,000 claims, if not more, so that should the Trust continue in the Center, it may exhaust its current assets somewhere between the years 2005, 6, 7, 8, somewhere in that span, with a substantial number of unpaid claims. The ability of the Center to regulate and control claims resolution per year has been severely hampered by the Supreme Court's *Georgine* ruling. The combination of these developments ripened the New NGC's liability matter. This declaratory judgment action focused on the availability of a tort system remedy for unknown asbestos disease claimants not discharged by the Bankruptcy Code and not satisfied by the Trust. This in turn has a substantial impact on the court's analysis of the Trust's motion to withdraw from the Center. This particular issue raised by the declaratory

action, the confirmation order contemplated would have been deferred until it ripened in an individual case to be considered by another court of competent jurisdiction had the circumstances not changed. But the circumstances have changed. They have ripened. This is a court of competent jurisdiction to make this determination.

Accordingly, pursuant to the plan of reorganization as modified and as confirmed by the order of this court with the order governing, New NGC is liable for non-discharged asbestos disease claims to the extent NGC would have been liable prior to confirmation. I'd ask counsel for the Trust to please prepare a final judgment accordingly.

* * *

TITLE 11—BANKRUPTCY
CHAPTER 1—GENERAL PROVISIONS

§ 105. Power of Court

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

* * *

CHAPTER 5—CREDITORS, THE DEBTOR, AND THE ESTATE
SUBCHAPTER II—DEBTOR'S DUTIES AND BENEFITS

§ 524. Effect of discharge

* * *

(g)(1)(A) After notice and hearing, a court that enters an order confirming a plan of reorganization under chapter 11 may issue, in connection with such order, an injunction in accordance with this subsection to supplement the injunctive effect of a discharge under this section.

(B) An injunction may be issued under subparagraph (A) to enjoin entities from taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any claim or demand that, under a plan of reorganization, is to be paid in whole or in part by a trust described in paragraph (2)(B)(i), except such legal actions as are expressly allowed by the injunction, the confirmation order, or the plan of reorganization.

(2)(A) Subject to subsection (h), if the requirements of subparagraph (B) are met at the time an injunction described in paragraph (1) is entered, then after entry of such injunction, any proceeding that involves the validity, application, construction, or modification of such injunction, or of this subsection with respect to such injunction, may be commenced only in the district court in which such in-

junction was entered, and such court shall have exclusive jurisdiction over any such proceeding without regard to the amount in controversy.

(B) The requirements of this subparagraph are that—

(i) the injunction is to be implemented in connection with a trust that, pursuant to the plan of reorganization—

(I) is to assume the liabilities of a debtor which at the time of entry of the order for relief has been named as a defendant in personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products;

(II) is to be funded in whole or in part by the securities of 1 or more debtors involved in such plan and by the obligation of such debtor or debtors to make future payments, including dividends;

(III) is to own, or by the exercise of rights granted under such plan would be entitled to own if specified contingencies occur, a majority of the voting shares of—

(aa) each such debtor;

(bb) the parent corporation of each such debtor; or (cc) a subsidi-

ary of each such debtor that is also a debtor; and (IV) is to use its assets or income to pay claims and demands; and

(ii) subject to subsection (h), the court determines that—

(I) the debtor is likely to be subject to substantial future demands for payment arising out of the same or similar conduct or events that gave rise to the claims that are addressed by the injunction;

(II) the actual amounts, numbers, and timing of such future demands cannot be determined;

(III) pursuit of such demands outside the procedures prescribed by such plan is likely to threaten the plan's purpose to deal equitably with claims and future demands;

(IV) as part of the process of seeking confirmation of such plan—

(aa) the terms of the injunction proposed to be issued under paragraph (1)(A), including any provisions barring actions against third parties pursuant to paragraph (4)(A), are set out in such plan and in any disclosure statement supporting the plan; and

(bb) a separate class or classes of the claimants whose claims are to be addressed by a trust described in clause (i) is established and votes, by at least 75 percent of those voting, in favor of the plan; and

(V) subject to subsection (h), pursuant to court orders or otherwise, the trust will operate through mechanisms such as structured, periodic, or supplemental payments, pro rata distributions, matrices, or periodic review of estimates of the numbers and values of present claims and future demands, or other comparable mechanisms, that provide reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner.

(3)(A) If the requirements of paragraph (2)(B) are met and the order confirming the plan of reorganization was issued or affirmed by the district court that has jurisdiction over the reorganization case, then after the time for appeal of the order that issues or affirms the plan—

(i) the injunction shall be valid and enforceable and may not be revoked or modified by any court except through appeal in accordance with paragraph (6);

(ii) no entity that pursuant to such plan or thereafter becomes a direct or indirect transferee of, or successor to any assets of, a debtor or trust that is the subject of the injunction shall be liable with respect to any claim or demand made against such entity by reason of its becoming such a transferee or successor; and

(iii) no entity that pursuant to such plan or thereafter makes a loan to such a debtor or trust or to such a successor or transferee shall, by reason of making the loan, be liable with respect to any claim or demand made against such entity, nor shall any pledge of assets made in connection with such a loan be upset or impaired for that reason;

(B) Subparagraph (A) shall not be construed to—

(i) imply that an entity described in subparagraph (A)(ii) or(iii) would, if this paragraph were not applicable, necessarily be liable to any entity by reason of any of the acts described in subparagraph (A);

(ii) relieve any such entity of the duty to comply with, or of liability under, any Federal or State law regarding the making of a fraudulent conveyance in a transaction described in subparagraph (A)(ii) or (iii); or

(iii) relieve a debtor of the debtor's obligation to comply with the terms of the plan of reorganization, or affect the power of the

court to exercise its authority under sections 1141 and 1142 to compel the debtor to do so.

(4)(A)(i) Subject to subparagraph (B), an injunction described in paragraph (1) shall be valid and enforceable against all entities that it addresses.

(ii) Notwithstanding the provisions of section 524(e), such an injunction may bar any action directed against a third party who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of—

(I) the third party's ownership of a financial interest in the debtor, a past or present affiliate of the debtor, or a predecessor in interest of the debtor;

(II) the third party's involvement in the management of the debtor or a predecessor in interest of the debtor, or service as an officer, director or employee of the debtor or a related party;

(III) the third party's provision of insurance to the debtor or a related party; or

(IV) the third party's involvement in a transaction changing the corporate structure, or in a loan or other financial

transaction affecting the financial condition, of the debtor or a related party, including but not limited to—

(aa) involvement in providing financing (debt or equity), or advice to an entity involved in such a transaction; or

(bb) acquiring or selling a financial interest in an entity as part of such a transaction.

(iii) As used in this subparagraph, the term "related party" means—

(I) a past or present affiliate of the debtor;

(II) a predecessor in interest of the debtor; or

(III) any entity that owned a financial interest in—

(aa) the debtor;

(bb) a past or present affiliate of the debtor; or

(cc) a predecessor in interest of the debtor.

(B) Subject to subsection (h), if, under a plan of reorganization, a kind of demand described in such plan is to be paid in whole or in part by a trust described in paragraph (2)(B)(i) in connection with which an injunction described in paragraph (1) is to be implemented, then such injunction shall be valid and enforce-

able with respect to a demand of such kind made, after such plan is confirmed, against the debtor or debtors involved, or against a third party described in subparagraph (A)(ii), if—

(i) as part of the proceedings leading to issuance of such injunction, the court appoints a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands of such kind, and ,

(ii) the court determines, before entering the order confirming such plan, that identifying such debtor or debtors, or such third party (by name or as part of an identifiable group), in such injunction with respect to such demands for purposes of this subparagraph is fair and equitable with respect to the persons that might subsequently assert such demands, in light of the benefits provided, or to be provided, to such trust on behalf of such debtor or debtors or such third party.

(5) In this subsection, the term "demand" means a demand for payment, present or future, that—

(A) was not a claim during the proceedings leading to the confirmation of a plan of reorganization;

(B) arises out of the same or similar conduct or events that gave rise to the claims addressed by the injunction issued under paragraph (1); and

(C) pursuant to the plan, is to be paid by a trust described in paragraph (2)(B)(i).

(6) Paragraph (3)(A)(i) does not bar an action taken by or at the direction of an appellate court on appeal of an injunction issued under paragraph (1) or of the order of confirmation that relates to the injunction.

(7) This subsection does not affect the operation of section 1144 or the power of the district court to refer a proceeding under section 157 of title 28 or any reference of a proceeding made prior to the date of the enactment of this subsection.

(h) Application to Existing Injunctions.—For purposes of subsection (g)—

(1) subject to paragraph (2), if an injunction of the kind described in subsection (g)(1)(B) was issued before the date of the enactment of this Act, as part of a plan of reorganization confirmed by an order entered before such date, then the injunction shall be considered to meet the requirements of subsection (g)(2)(B) for purposes of subsection (g)(2)(A), and to satisfy subsection (g)(4)(A)(ii), if—

(A) the court determined at the time the plan was confirmed that the plan was fair and equitable in accordance with the requirements of section 1129(b);

(B) as part of the proceedings leading to issuance of such injunction and confirmation of such plan, the court had appointed a legal representative for the purpose of protecting the rights

of persons that might subsequently assert demands described in subsection (g)(4)(B) with respect to such plan; and

(C) such legal representative did not object to confirmation of such plan or issuance of such injunction; and

(2) for purposes of paragraph (1), if a trust described in subsection (g)(2)(B)(i) is subject to a court order on the date of the enactment of this Act staying such trust from settling or paying further claims—

(A) the requirements of subsection (g)(2)(B)(ii)(V) shall not apply with respect to such trust until such stay is lifted or dissolved; and

(B) if such trust meets such requirements on the date such stay is lifted or dissolved, such trust shall be considered to have met such requirements continuously from the date of the enactment of this Act.

* * *

TITLE 11—BANKRUPTCY
CHAPTER 7—LIQUIDATION
SUBCHAPTER II—COLLECTION, LIQUIDATION, AND DISTRIBUTION OF THE ESTATE

§ 727. Discharge

(a) The court shall grant the debtor a discharge, unless—

(1) the debtor is not an individual;

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition;

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

(4) the debtor knowingly and fraudulently, in or in connection with the case—

(A) made a false oath or account;

(B) presented or used a false claim;

(C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or

(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;

(5) t he debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

(6) the debtor has refused, in the case —

(A) to obey any lawful order of the court, other than an order to respond to a material question or to testify;

(B) on the ground of privilege against self-incrimination, to respond to a material question approved by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or

(C) on a ground other than the properly invoked privilege against self-incrimination, to respond to a material question approved by the court or to testify;

(7) the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case, under this title or under the Bankruptcy Act, concerning an insider;

(8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371, or 476 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition;

(9) the debtor has been granted a discharge under section 1228 or 1328 of this title, or under sec-

tion 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least—

(A) 100 percent of the allowed unsecured claims in such case; or

(B)(i) 70 percent of such claims; and

(ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort; or

(10) the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter.

* * *

TITLE 11—BANKRUPTCY
CHAPTER 11—REORGANIZATION
SUBCHAPTER II—POST-CONFIRMATION MATTERS

§ 1141. Effect of confirmation

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

(d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan—

> **(A)** discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not—
>
> > **(i)** a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;
> >
> > **(ii)** such claim is allowed under section 502 of this title; or
> >
> > **(iii)** the holder of such claim has accepted the plan; and
>
> **(B)** terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) The confirmation of a plan does not discharge an individual debtor from any debt excepted from discharge under section 523 of this title.

(3) The confirmation of a plan does not discharge a debtor if—

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

(4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter.